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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 418

NICHOLS & COMPANY, *Petitioner*

vs.

THE UNITED STATES, *Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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NICHOLS & COMPANY, *Petitioner*

vs.

THE UNITED STATES, *Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Nichols & Company prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in this case on March 7, 1962, and the order of the Court of Claims entered in this case on May 9, 1962, denying petitioner's motion for rehearing and other relief.

### THE OPINION BELOW

The opinion in the Court of Claims is reported at Ct. Cls. , and F. 2d . It is set forth in the Appendix.

## JURISDICTION

The judgment of the Court of Claims was entered on March 7, 1962 (App. *supra* pp. 20, 74). A timely motion for rehearing and other relief was denied on May 9, 1962 (App. p. 75; R-235).[1] By an order dated July 26, 1962 Justice White extended the time for petitioning for certiorari to and including September 6, 1962. The jurisdiction of this Court is invoked under 28 USC 1255.

---

[1] The reference "R" is used to refer to what corresponds to the historical common law record, certified separately by the Clerk of the Court of Claims. It includes the pleadings, the Commissioner's report, the opinion, judgment and findings of the Court of Claims, and the order denying petitioner's motion for reconsideration and other relief.

Petitioner has designated for inclusion in the transcript the complete record and all proceedings and evidence in the case in the Court of Claims. References to the transcript of testimony are herein indicated by "Tr". Other references are believed to be self-explanatory.

Petitioner has been informed by the Clerk of this Court that provisions of Rule 21 of this Court permitting optional filing of the record as printed for the use of the Court below, do not apply to the Court of Claims, because a court of first instance. Petitioner accordingly will lodge with the Clerk of this Court 9 sets of copies of certain documents believed desirable for convenient consideration of the issues by this Court. They will include the printed Commissioner's report, printed exceptions of the parties to that report, petitioner's printed motion for re-hearing, defendant's response and petitioner's reply thereto.

The pages of the Commissioner's report so lodged will be numbered corresponding to the numbering placed thereon by the Clerk of the Court of Claims in preparing the certified record. Thus, references in the petition to pages of the Commissioner's report may be readily located in the lodged copies, as well as in the certified copy.

## THE QUESTIONS PRESENTED

1. Did the Court deny petitioner basic rights guaranteed by the Fifth Amendment in failing to give petitioner the benefit of well-established rules of law which

a. require that inspection made by the purchaser under contracts of sale, take place in the manner provided by the contract;

b. excuse a seller from the condition of inspection in a contract of sale, when the purchaser arbitrarily rejects the goods without inspection;

c. require that executive regulations be non-discriminatory, and that in particular, a Department of Agriculture regulation affecting the marketing of agricultural products must not be discriminatory;

d. require regulations to be published in the Federal Register in accordance with the Administrative Procedure Act, so that the public may ascertain with reasonable certainty the nature and scope of its rights and duties.

2. Did the Court deny petitioner the full and fair hearing guaranteed it by the Fifth Amendment in:

a. disregarding facts found by it;

b. disregarding facts reported by the Commissioner, and supported by undisputed evidence;

c. disregarding facts supported by undisputed evidence, concerning which there was no controversy;

d. making findings of fact adverse to petitioner, with no support in the evidence, and frequently with no request by either party as a basis therefor.

3. Did the Court err in refusing to grant petitioner a rehearing following its dismissal of three counts due to a misunderstanding of petitioner's oral argument, erroneously believed by the Court to include a concession that damages had not been proved under those three counts.

## CONSTITUTIONAL PROVISION, STATUTE, AND REGULATIONS INVOLVED

This case involves the Fifth Amendment of the Constitution, which provides in relevant part:

> "Amendment V. Due Process of Law
>
> No person . . . shall be deprived of life, liberty, or property, without due process of law; . . ."

The statutory provision involved is the Administrative Procedure Act (Act of June 11, 1946, 60 STAT. 238) which provides in relevant part:

> 5 U.S.C. 1001(c) . . . Rule means the whole or any part of any agency statement of general or particular applicability and future effect designed to . . . or prescribe the law or policy or to describe the organization, procedure, or practice requirements of any agency . . .
>
> 5 U.S.C. 1002 . . . Rules.—Every agency shall separately state and currently publish in the Federal Register . . . (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available . . . ; and (3) substantive rules adopted as authorized by law . . . No person shall in any manner be required to resort to organization or procedure not so published.

The regulations involved are those pertinent to USDA grading service, 7 C.F.R., part 55 (1949 ed) as follows:

> § 55.2 *Terms defined.* For the purpose of the regulations in this part, unless the context otherwise requires, the following terms shall be construed, respectively, as follows:
>
> (a) "Act" means the following provisions of the Department of Agriculture Appropriation Act, 1952 (Pub. Law 135, 82d Cong., approved August 31, 1951), or any future act of Congress conferring like authority:

* * * Market inspection of farm products: For the investigation and certification, in one or more jurisdictions, to shippers and other interested parties of the class, quality, and condition of any agricultural commodity or food product, whether raw, dried, canned, or otherwise processed, and any product containing an agricultural commodity or derivative thereof when offered for interstate shipment or when received at such important central markets as the Secretary may from time to time designate, or at points which may be conveniently reached therefrom under such rules and regulations as he may prescribe, including payment of such fees as will be reasonable and as nearly as may be to cover the cost for the service rendered * * *

* * * * *

(d) "Administration" means the Production and Marketing Administration of the Department.

(e) "Administrator" means the Administrator of the Production and Marketing Administration of the Department or any other officer or employee of the Department, to whom there has heretofore been delegated, or to whom there may hereafter be delegated, the authority to act in his stead.

* * * * *

(g) "Interested party" means any person financially interested in a transaction involving any grading, appeal grading, or regrading of any product.

* * * * *

(i) "Grader" means any employee of the Department authorized by the Secretary, or any other person to whom a license has been issued by the Secretary, to investigate and certify, in accordance with the act and this part, to shippers of products and other interested parties the class, quality, and condition of such products.

* * * * *

(k) "Inspector" means any employee of the Department authorized by the Secretary, or any other person to whom a license has been issued by the Secretary, to inspect and certify the condition and wholesomeness of products.

(l) "Supervisor of packaging" means any employee of the Department authorized by the Secretary, or any other person to whom a license has been issued by the Secretary, to supervise the packaging and grade-labeling of products.

(m) "Product" or "products" means eggs (whether shell, liquid, frozen, or dried), egg products, and such other perishable farm products as the Secretary may hereafter designate. Such term shall also include any food product which is prepared or manufactured from any product if such product constitutes at least 50 percent, by weight, of all the ingredients used in the preparation or manufacture of such food product.

* * * * *

(y) "Official plant" means any plant in which the facilities and methods of operation therein have been found by the Administrator to be suitable and adequate for grading service in accordance with this part.

* * * * *

§ 55.5 *Where grading service is offered.* Any product may be graded, inspected, and sampled wherever a grader, sampler, or inspector is available and the facilities and the conditions are satisfactory for the conduct of the grading service.

* * * * *

§ 55.7 *Who may obtain grading, inspection, and sampling service.* An application for grading, inspection, or sampling service may be made by any interested person, including, but not being limited to, the United States, any State, county, municipality, or common carrier, and any authorized agent of the foregoing.

§ 55.8 *How to make application.* An application for any grading service may be made in any office of grading, or with any grader, sampler, or inspector at or nearest the place where the service is desired. Such application for service may be made orally (in person or by telephone), in writing, or by telegraph. If an application for grading service is made orally, the office of grading, grader, sampler, or inspector with whom such application is made, or the Administrator, may require that the application be confirmed in writing.

* * * * *

§ 55.19 *Grading certificate issuance.* Each grader and each inspector shall issue a grading certificate covering each product graded; but in no case shall a grader or inspector sign any certificate covering any product not graded by him.

* * * * * *

§ 55.22 *When appeal grading may be requested.* An application for an appeal grading may be made by any interested party who is dissatisfied with any determination stated in any grading certificate, if the identity of the samples, or the product, has not been lost; and such application for an appeal grading shall be made within two days following the day on which the grading was performed. Upon approval by the Administrator, the time within which an application for an appeal grading may be made may be extended.

§ 55.23 *How to obtain appeal grading.* Appeal grading may be obtained by filing a request therefor (a) with the Administrator, (b) with the grader or inspector who issued the grading certificate with respect to which the appeal grading is requested, (c) with the immediate superior of such grader or inspector, or (d) with the officer in charge of any office of grading. The application for appeal grading shall state the reasons therefor and may be accompanied by a copy of the aforesaid grading certificate or any other information the applicant may have secured regarding the product, at the time of grading from which the appeal is requested. Such application may be made orally (in person or by telephone), in writing, or by telegraph. If made orally, written confirmation may be required.

* * * * *

§ 55.30 *Regrading of a graded product; application for regrading of a graded product.*—(a) *Regrading of a graded product.* Whenever the immediate superior of a grader has evidence that such grader incorrectly graded a product, such superior shall immediately make a regrading of the product.

(b) *Application for regrading of a graded product.* An application for the regrading of any previously graded product may be made at any time by any in-

terested party; and such application shall clearly indicate the reasons for requesting the regrading. The provisions of the regulations relative to grading service shall apply to regrading service.

* * * * *

LICENSED GRADERS, INSPECTORS, SAMPLERS, AND SUPERVISORS OF PACKAGING

§ 55.33 *Who may be licensed.* Any person possessing proper qualifications, as determined by an examination for competency, may be licensed by the Secretary as a grader, inspector, sampler, or supervisor of packaging. Such examination shall be held at such time and in such manner as may be prescribed by the Administrator. All licenses issued by the Secretary shall be countersigned by the officer in charge of the poultry grading and inspection service of the Administration. Any prospective licensee, other than a Federal or State employee, shall, prior to the granting of the license, procure and deliver to the Administration a surety bond, issued by such surety as may be approved by the Administrator, in the amount of $1,000 for the proper performance of the duties of such licensee under the act and this part.

§ 55.34 *Limited license may be issued.* To any person possessing proper qualifications, as determined by the Administrator, there may be issued a limited license by the Secretary to perform the following functions: (a) To candle and grade eggs on the basis of Official United States Standards of Quality of Individual Shell Eggs with respect to eggs purchased from producers or eggs to be packaged with official identifications, and (b) to inspect liquid and frozen eggs that are produced under the supervision of an inspector. No person to whom a limited license is issued by the Secretary shall have the authority to issue any grading certificate; and all eggs (whether shell, liquid, or frozen) which are graded and inspected by any such person shall thereafter be check-graded and check-inspected by a grader or an inspector. All limited licenses, issued as aforesaid shall be countersigned by the aforesaid officer in charge of the poultry grading and inspection service of the Administration.

§ 55.35 *Suspension of license.* Pending final action by the Secretary the aforesaid officer in charge of the poultry grading and inspection service may, whenever he deems such action necessary, suspend any license or limited license issued pursuant to this part, by giving notice of such suspension to the respective licensee or limited licensee, accompanied by a statement of the reasons therefor. Within seven days after the receipt of the aforesaid notice and statement of reasons by such licensee or limited licensee, he may file an appeal in writing, with the Secretary supported by any argument or evidence that he may wish to offer as to why his license or limited license should not be suspended or revoked. After the expiration of the aforesaid seven day period and consideration of such argument and evidence, the Secretary will take such action as he deems appropriate with respect to such suspension or revocation.

* * * * *

§ 55.52 *Supervisor of packaging required.* The official identification of any graded or inspected product, as provided in §§ 55.49 to 55.55, both inclusive, shall be done only under the supervision of a grader, inspector, or supervisor of packing. The authority to use grade identification labels may be granted by the Administrator only to applicants who make the services of a supervisor of packaging available for use in accordance with this part.

## STATEMENT

### Prefatory Apologia

This is a suit against the United States in the Court of Claims under the Tucker Act, 28 USC 1491, by petitioner, to recover damages for breaches of contracts entered into with the United States Department of Agriculture (hereinafter sometimes referred to as USDA).

Petitioner is mindful of this Court's requirement of brevity. Any superficial appearance of undue length in this petition will, petitioner submits, be dispelled in its reading.

Petitioner in preparing the case for trial as originally filed discovered wholesale and persistent fraud in the official USDA grading of eggs at Chicago, the nation's largest terminal market. Victims were down-state shippers such as petitioner, and the consuming public.

Knowledge by certain USDA officials that petitioner intended to use the statistical study demonstrating fraud in evidence in the case, produced a climax of acts designed to deter petitioner from filing and prosecuting this action.

Somewhat full discussion is further warranted by the published opinion of the Court, severely and expressly condemning petitioner for making unfounded charges against conscientious government employees. The effect of that condemnation would necessarily be to discredit petitioner in its petition to this Court, as well as to make certain that petitioner's president, unless relieved from that stigma, will be barred from the industry in which he has spent his entire working life.

These unusual features of this case, and other almost equally remarkable and unusual aspects of it, are herein presented for this Courts' consideration.

## I.

## PETITIONER AND ITS BUSINESS

Petitioner and its predecessor companies have been engaged in the wholesale poultry and egg business in rural Iowa and Illinois for many years. Owned by the Nichols family, the business was one of the largest of its kind in the United States. The experience and training of three generations of this family were among its intangible assets. (App. 20, Pl. Ex. 13, p. 4)

In 1951, petitioner used as bases of operation two modern well-equipped plants in rural Illinois, 10 miles apart, in the towns of Avon and Bushnell. The Bushnell plant was equipped for poultry dressing and for freezing the contents of eggs broken out of the shell, as well as handling

shell eggs. A fleet of modern, air-conditioned trucks had regular routes running into Missouri and Iowa to pick up eggs from petitioner's regular suppliers. At both plants the eggs were then graded for quality, and packed. Petitioner was a consistent quality egg buyer, offering its farmer-suppliers a market for quality eggs at premium prices. (R. 111, App. 20, Pl. Ex. 13, pp. 4-6).

II.

**USDA GRADING SERVICE**

For many years the Department of Agriculture has performed official grading and certification of quality of eggs and poultry. Resident graders were furnished individual plants, (a separate contract normally being made for each plant although with the same concern), under standard contracts for continuous grading service upon the payment of various fees and charges which made USDA grading service self-sustaining. (App. 21)

In 1951 and the first part of 1952, contracts in the standard form were entered into with petitioner which called for official resident grading of shell (unbroken) eggs at both Avon and Bushnell, and frozen eggs and poultry at Bushnell. (App. 51).

In addition, and as was customary, separate, standard continuous service contractual arrangements were made time after time with the USDA beginning in 1951, for grading shell eggs packed in the familiar 1-dozen capacity consumer carton; these agreements were general, not confined to a single plant. The grading involved could be performed only upon USDA additional authorization to a resident, licensed shell egg grader, to grade eggs in consumer cartons, as well as in the standard 30-dozen case. (R. 117-122)

USDA grading service was permissive, in the sense that the products could, by laws, be marketed without official grading. Customer demand made USDA grading a business necessity. (App. 21)

In 1952, petitioner in its own name, and also in the name of its broker, Sol Rich & Co., made numerous bids to sell shell eggs to the USDA, under a surplus commodity purchase program. Acceptances obligated petitioner to deliver about 57,000 cases of eggs (of 30-dozen capacity) at Peoria, Illinois, Memphis, Tennessee, Burlington, Iowa, and St. Louis, Missouri. Inspection was to be made by the USDA before acceptance. Performance began in August of 1952, and continued into November of that same year. (App. 22-32)

## III.

## THE PETITION AS ORIGINALLY FILED IN THE COURT OF CLAIMS

### The First Four Counts

The Court of Claims petition initially contained four counts. (R. 1-31)

Count I charged prejudiced, biased, unfair and fraudulent inspections at Peoria on the part of Thomas McCurley, State Supervisor for the USDA, and his assistant, Robert Young; refusal by them to inspect and to re-inspect lots tendered for that purpose; and related misconduct, in breach of the contracts of sale; and use by the USDA of a candler in making all inspection at all points, in violation of those contracts, due to its excessive candlepower and unduly concentrated light beam.[1]

Counts II, III, and IV charged the USDA with breaches of contract from early 1952 onward, by failure to provide grading service with respect to frozen eggs, shell eggs in consumer cartons, and poultry, respectively.

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[1] The quality of an egg is determined by a process called candling. This consists of holding the egg before a light beam in a darkened room; the shadows of the contents may be seen through the translucent shell. (App. 46)

## IV.

## THE ORIGIN AND NATURE OF COUNT V

### A. Dolson's Threat to Destroy Petitioner for Seeking Justice

Shortly after McCurley began inspecting eggs tendered for delivery at Peoria, petitioner complained under the standard disputes clause that his inspections were biased, unfair and prejudiced, and of refusal to both re-inspect and to inspect in the first instance lots tendered for that purpose. No decision was ever made by the USDA on these and subsequent complaints to the same effect. (App. 44, 46)

In the fall of 1952, shortly after complete performance of the contracts of sale, Merlin Nichols, petitioner's president, told Lawrence Dolson, Regional Supervisor for USDA, that he intended to file a claim against the Government. Dolson responded by threatening to put petitioner out of business by the exercise of his authority to supervise the administration of the production and marketing inspection and grading service. (App. 56, 57, R. 62)

Petitioner's difficulties with McCurley and Dolson in obtaining grading service increased, especially after the filing of such a claim with the General Accounting Office on January 18, 1953. (Pl. Ex. 13)

### B. Petitioner's Discovery of Widespread Fraudulent USDA Egg Grading

Petitioner's written claim to the General Accounting Office stressed the "large area for the exercise of personal judgment and opinion which makes bias or prejudice by inspectors so ruinous in its consequences." (Pl. Ex. 13, p. 4).

The USDA filed a statement in opposition to the claim's allowance, to the effect that egg grading was almost precise science, leaving little room for the exercise of judgment, which, in McCurley's case, might be affected by bias, prejudice, or ill will. (Def. Ex. 2, pp. 5, 6)

To counter that contention, petitioner made a statistical study of four years' (1949-1952) of all official USDA grading at Chicago as shown by official certificates. (App. 48, 49)

The study showed more than substantial variation due to judgment differences. It showed persistent and widespread fraud in official USDA grading of eggs.[1] (App. 49)

Eggs purchased by dealers in the Chicago terminal market from rural areas and paid for on the basis of USDA grading on their arrival were, after 7 or 8 months in storage, graded upon their sale as if they had increased, remained constant, or counter to standard experience had diminished only slightly in quality. (App. 48, 49)

The market system of premiums and discounts enabled the Chicago dealers to obtain substantial but illicit profits from the fraudulent grading, without ever seeing an egg, victimizing rural shippers and/or the consuming public. (App. 48, 49)

**C. The Cancellation of All Petitioner's Grading Service Contracts and Destruction of Its Business, Giving Rise to Count V**

In late March of 1955, in the course of preparation for trial, the USDA learned that petitioner intended to put its statistical study in evidence. (Pl. Ex. 14) At the time petitioner was operating under the highly profitable Tri-States Marketing Plan as exclusive selling agent for 39

[1] The Court made this finding in terms of concessions wrung on cross-examination from high ranking USDA officials Termohlen and Miller, stating that they testified the variations "could not be attributed to human error," *i.e.*, they were due to human *design*.

The Court also found (App. 49) that the USDA "declined to verify or dispute . . . analyses" which showed the fraud.

wholesalers. The resident egg inspector assigned by USDA to petitioner was replaced, at Dolson's direction, on April 15, 1955. The replacement, one John Schoonover, did not pass a single lots of eggs. He worked at such a slow pace that even if he had passed the lots sold, petitioner would not have had facilities for the lots coming in daily from the 39 member-wholesalers. (App. 64-68)

In the furor caused by Schoonover, all of petitioner's grading service contracts were, on May 3, 1955, cancelled by the USDA. The Tri-State Marketing Plan was destroyed. (App. 69-74)

Petitioner for several years thereafter operated unsuccessfully and then went out of business. (R. 158; petitioner's letter of Nov. 13, 1951 Ct. Cls.)

### D. The Addition of Count V to the Petition

Count V was added by amendment on October 7, 1955. It sets forth the foregoing events as a breach of implied promise not to commit acts designed to deter and to punish petitioner for asserting and enforcing its rights under its contracts with the USDA. (R. 37)

It was added only after months of negotiation, including invocation of the Senate Small Business Committee. By placing the issues before the Court, Count V precluded any further Congressional inquiry and action. (R. 232; Pl. Ex. 82)

## V.

## THE COMMISSIONER'S REPORT

After the conclusion of the trial sessions, the Commissioner on July 29, 1960, made his report to the Court. (R. 73-159) He found the merits of all the charges in petitioner's favor. Except by way of footnote to his findings,

he generally refrained from drawing ultimate, abstract conclusions of fact.[1]

The Commissioner found petitioner failed to prove the damages sustained under Counts II, III, and IV. He nonetheless reported the facts fully, because of their interrelationship with and bearing upon Counts I and V.

Both parties filed exceptions and briefed the issues for the Court below.

## VI.

## THE DECISION BELOW

The Court of Claims heard argument, and received a supplementary letter from petitioner about petitioner's then business status. Respondent's attorney represented to the Court orally that petitioner had continued in business and was in business the very day in November 1961 of the argument, which was counter to the information possessed by petitioner's attorney.

Checking back with his client following argument petitioner's attorney verified the fact that petitioner had been out of business for some time. Petitioner's attorney so stated in his letter of November 13, 1961 to the Court and opposing counsel offering to have the case reopened on that issue if necessary. (Letter certified by Clerk in Record.)

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[1] Defendant's Brief and Exceptions to the Commissioner's Report fairly described the report in stating (p. 188):

> "In his Report the Commissioner has generally avoided making ultimate findings of fact upon which a judgment for either party can be based. Instead, he has set out in narrative form a complex set of events extending over a considerable period of time, with the intention of having the reader draw inferences as to the motives of the parties and the propriety of their behavior from the order and juxtaposition of events, the emphasis given to certain incidents, and the direction to which the narrative seems to lead. To guide the reader in that direction, the Commissioner has appended a series of voluminous footnotes which serve as a gloss or running commentary on the text . . ."

Findings by the Court, a written opinion, and dismissal of the petition in its entirety followed. (App. 1-74; R. 161-234)

### A. The Involuntary "Voluntary Dismissal" of Counts II, III, and IV

Counts II, III and IV, relating to grading services denied from early 1952 onward, the Court dismissed pursuant to the following finding (App. 21):

> "3. Since, during the oral argument of this case, plaintiff conceded that it had failed to prove it sustained any damages under Counts II, III and IV, the Court makes no findings of fact with respect to those counts."

The Court's opinion ambiguously described the above finding by stating (App. 21):

> "(The) petition also contained Counts II, III, and IV, but our Commissioner has found, and plaintiff admitted, on oral argument, that it had not made out a case on these counts."

No such admission or concession was made, on oral argument or otherwise.

Petitioner had fully briefed those counts, and argued that they were meritorious. In connection with Counts III and IV, the point was made that the damages sought—expenses in expectation of USDA performance—were inadequate as a matter legal necessity. Petitioner was never able to obtain official grading of eggs in consumer cartons, and never able to operate its poultry dressing plant. Lost profits were, therefore, speculative.

Petitioner can only surmise that its argument about inability to prove *full* damages was misunderstood, as being an admission that *no* damages were proved.

Discussion of the specific facts proved under Counts II, III and IV demonstrate that the merits of the issues were

with petitioner and that petitioner should have been granted recovery. (*Infra*, pp. 21-24) There was, accordingly, no reason for petitioner to concede or admit any inadequacy in the claims those counts stated.

### B. The Failure to Make Findings Under Counts II, III, and IV Although Relevant to Counts I and V

As the above findings state, no other findings were made by the Court under Counts III, IV, and V.

The Commissioner had made full findings on the merits of those counts for the expressly reported reason that,

> ". . . It seems fair to report the facts rather fully, since the . . . position taken by McCurley is indicative of prejudice toward Nichols."[1]
>
> * * * * *
>
> "McCurley avoided giving Nichols the same service which was given to other dealers. Although Nichols did not prove the amount of loss under this count, the facts related in the finding are deemed pertinent in connection with prejudice."[2]

Counts II, III and IV, and the proof under them, were clearly relevant to prove Counts I and V.

The USDA officials responsible for the wrongs done petitioner under Counts III, IV and V were McCurley and Dolson, also accused of ill-will, prejudice and bad faith under Counts I and V.

The period of the wrongs under Counts II, III, and IV preceded and extended through the periods of Counts II and V. All the claimed wrongs were done under color of the offices those persons held in the USDA, to the injury of petitioner's business. The same pattern was common to all five (5) counts, of concurrent and similar wrongs, by McCurley and Dolson in the exercise of their official authority over USDA grading service. (*Infra*, pp. 21-56)

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[1] (R. 115).

[2] (R. 120).

By denying petitioner the official grading under Counts II, III and IV, McCurley and Dolson were depriving the public of products with grade officially certified. Under Counts I and V no such injury to the public was involved. Findings that McCurley and Dolson were will to and did violate their official duty to the public to harm petitioner were, a fortiori, highly relevant to show a concurrent willingness, disposition and intent to harm petitioner under the other counts. The wrongs done under Counts I and V were not so clearly in violation of their official duties.[1]

Petitioner consistently stressed the relevance between the facts found under all five (5) counts.[2] That relevance will appear clearly in discussion herein of the specific facts proved under them. (*Infra*, pp. 21-56)

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[1] McCurley in forcing petitioner to re-work lots tendered under the contracts of sale, time after time, caused them to deteriorate and become loss. (Ct. F. 38, pp. 47, 48) McCurley was thus removing surplus eggs from the market beyond the amount petitioner had contracted to sell.

[2] *E.g.*, in referring to Counts II, III, and IV, Plaintiff's briefs to the Court below stated:

> "The difficulties plaintiff first had, in connection with grade labelling, and frozen egg and dressed poultry inspection service, are described herein initially. *The wrongful denials of such services by the USDA*—important in their own right—*are of even greater significance as preceding and foreshadowing the more drastic wrongs to plaintiff which followed.*" (Emphasis supplied) (Plaintiff's Main Brief, p. 14)
>
> * * * * *
>
> "All these wrongs to plaintiff are completely inconsistent with the honest judgment McCurley and Young were required to exercise as representatives of the Agriculture Department under the contracts, in making their inspections." (Plaintiff's Reply Brief, p. 48)

### C. The Dismissal of Counts I and V

The Court below dismissed Counts I and V for a failure of proof, and for legal insufficiency of the facts found.

The Court in reinforcing its dismissal, made the unusual, unprecedented statement [1] in its opinion (App. 5) that

> ". . . plaintiff is to be severely condemned for making unsupported charges against Government officials and employees who were doing their duty."

The Court's findings under Counts I and V for the most part adopt verbatim the findings of the Commissioner. Deviations occur in significant omissions and additions, frequently made without any exception by a party as a basis therefor.

The opinion wholly fails to portray the true facts, departing widely even from the Court's findings. It also indicates misapprehension of certain of the issues, and various misconceptions of the relevance of the facts the Court found.

These matters petitioner sets forth specifically in connection with each count while avoiding as far as possible repetition of what has been stated. (*Infra*, pp. 27-56)

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[1] This statement obviously refers to McCurley, as well as Dolson. Its reference to McCurley appears from a later decision where Court of Claims said:

> ". . . We cannot accept an allegation of prejudice or fraud against a responsible government official when based on anything less than evidence constituting clear and convincing proof. Nicholas & Company v. The United States, No. 98-54. *Ottinger* v. *United States*, 301 F. 2d 336 at 340 (1962).

Expressed conditionally in the opinion, the above condemnation became absolute when later in the opinion the Court removed the condition.

## VII.

## MOTION FOR REHEARING DENIED

Petitioner's attorney filed a printed motion for a rehearing which the Court summarily denied. (R. 235; App. 75)

## VIII.

## THE TRUE FACTS AND THEIR TREATMENT BY THE COURT

The various events which comprise the first five counts, although separated for pleading purposes, as they occurred constituted a unified and contemporaneous whole, mutually interdependent and confirmatory of each other. They are given such unity by a common thread of prejudice, hostility, and oppressive abuse of power by the same officials of USDA, over a 4-year period.

### A. Count II—Frozen Egg Grading Service

In November of 1951 and again in January of 1952, petitioner made application on the USDA contract form for continuous grading service for frozen eggs at its Bushnell plant.[1]

Both these applications were approved by USDA in the months in which made. (App. 51) As of this time, application approval followed plant approval, and gave petitioner an immediate and unconditional right to the resident grading service specified. (R. 111-113; 7CFR 55.102(b), 1949 ed.)

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[1] None of petitioner's contracts for grading service had any definite termination date but were effective until cancelled. Repeated agreements were executed due to the changes in the name in which petitioner was doing business, or because of changes in the schedule of fees and charges set forth in the agreements.

The regulations then provided that an "application . . . may be approved only with respect to an official plant," in turn defined as one "in which the facilities and methods of operation therein *have been* found . . . suitable and adequate for grading service . . ." (Emphasis supplied) (7 CFR 55.2(y) 1949 ed.)

The season for breaking eggs was from January through July. (R. 117) McCurley's first move to furnish grading service occurred at the end of June 1952 when he proposed to license a plant employee whom petitioner intended to discharge for theft. Up to this point of time he and Dolson had been making various demands upon petitioner in disregard of the plant approval before application approval. For some time thereafter McCurley declined to designate anyone else for the plant on the ground that petitioner was trying to pick its own inspector; and, by way of reprisal, determined to appoint a Government employee as inspector rather than a plant employee as grader under bond to the USDA to faithfully perform his duties. (R. 113-117)

The use of a Government grader would be much more costly, not only due to higher levels of salary, annual leave, and other incidents of Government employment, but also because petitioner would be unable to make use of the resident Government-employed graders' time not occupied in official grading and related work. (R. 115)

McCurley reported the incident, in writing, to USDA as if in a spirit of perfect harmony he had promptly acceded to Mr. Nichol's objection to the individual involved in theft. (Def. Ex. 2, p. 20)

Petitioner broke eggs at the Bushnell plant for frozen egg products throughout the 1952 season but on a very small scale, (R. 117) because of the lack of official Government grading. (App. 21) The year 1952 was profitable for egg breaking. (R. 117)

Defendant sought to justify the denial of frozen egg grading during 1952 on the ground that plant inspection was necessary, following approval of petitioner's applications. It cited in that regard regulations which became effective April 1, 1952 and which, for the first time, made plant approval precede, rather than follow, application approval. (R. 25-27; R. 113)

Petitioner did not secure frozen egg grading service until January of 1953. (R. 117)

Petitioner excepted to the disallowance of any damages by the Commissioner and set forth in its exceptions a rational formula for the allowance of damages of $34,000.00.

The profit ratio on sales made in 1953 was applied to the volume of frozen eggs, which would have been produced, as a by-product of petitioner's shell egg business, had petitioner had official grading, and reduced by profits actually earned. (Pl. Excep., pp. 58-61)

This exception was not considered by the Court of Claims for reasons already set forth.

### B. Count III—Consumer-Cartoned Egg Grading Service

From 1951 through 1955, petitioner repeatedly made application for and was granted in writing on the USDA's official form the privilege of having eggs in consumer cartons officially graded, and repeatedly petitioner's cartons and labels were approved. At no time did any USDA inspector assigned to petitioner's plants receive authorization needed to do such grading. As a result, petitioner sold practically no eggs in consumer cartons, and thereby lost the chain store market. (R. 45-50; Pl. Excep., pp. 61-62)

Respondent sought to justify the denial of this grading service on the specious ground that petitioner had not "made the services of a supervisor of packaging available." The regulations defined such a person as one authorized by the USDA to supervise grade labelling (7 CFR 55.2(i)) and the USDA was, therefore, the party to make such a person available, by a grant of authority never made. (R. 71; Pl. Exceptions, pp. 61-63)

Petitioner incurred expenses of close to $4,000.00 in expectation of this particular grading service, all of which was wasted, and asked for that sum to be allowed as a recovery. (R. 121, 122; Pl. Excep., p. 63)

### C. Count IV—Poultry Grading Service

Petitioner made application for poultry grading service on the standard USDA form on January 9, 1952. Blueprints of the plant were submitted some time prior to May 15, 1952, but their approval was delayed for no apparent reason until July of 1952, well into the season, which begins in the last half of the year. (R. 122, 123)

Initial and final plant surveys were necessary for plant operation with official grading. The initial survey did not occur until October 6, 1952, and resulted in approval of petitioner's application. In this period of 10 months delay petitioner was constantly demanding poultry grading service. (R. 122-124)

Thereafter, Dolson and McCurley kept finding specious fault with the plant. At Mr. Nichols' request, his Senator, on May 13, 1953, wrote the Secretary of Agriculture asking that he see that petitioner be told once and for all what was necessary, so that it could make the required changes and obtain the needed service. (Pl. Ex. 15) Less than a month later, on June 10, 1953, final approval was given the plant. (R. 124)

A poultry grader, Julius Antoine, was assigned to petitioner July 6, 1953. Just as petitioner was about to start dressing turkeys, Antoine was hounded by USDA officials into resigning. (R. 143)

Antoine shortly requested re-employment. Dolson was willing to employ him but not to assign him to petitioner. (Pl. Ex. 26) No other poultry grader was furnished, and petitioner was never able to operate. (R. 125) Plaintiff sought a recovery of $4,500.00 representing 3 years idle use of plant equipment which cost $30,000.00. (Pl. Excep. pp. 63-65)

## D. The Court's Opinion

The full and true story differs radically from the picture portrayed by the Court's opinion. Petitioner is expressly and by implication pictured as given to making heated, irresponsible and defamatory charges, increasingly extreme and intemperate, rather than substantiating the prior charges successively made as a substitution for substantiation of the preceding one. (App. 2)

The charges are described in terms of a quickly accelerating crescendo, beginning with a "heated protest" over the rejection of eggs under the contracts of sale, followed by "demands" that inspectors be relieved of their duties in grading petitioner's products. A climax is reached when "finally plaintiff alleged that officials (USDA) were in a conspiracy to put it out of business." (App. 2)

Speaking of this same "conspiracy" the opinion further states (App. 13) that, "Plaintiff has completely failed to prove such a design. It reiterates over and over that there was such a design but evidence to support the charge is lacking."

Unmentioned is the fact that the Court's Commissioner reported (R. 152):

> "There appears to be little doubt that some of the (USDA) officials were determined to destroy the business of Nichols, insofar as U. S. grade-standards were concerned; also that other business would have to be limited."

As if preposterous, and as a further instance of intemperate accusation, the opinion states (App. 3) that, "During the trial, plaintiff or its attorney, charged one of the inspectors who testified with perjury."

No such charge was made during the trial, but was made in briefs following the trial sessions, a charge which petitioner reiterates and herein demonstrates to be true. In

fact, as is shown, the Court's own findings so convict McCurley.[1] (*Infra* pp. 59, 60)

Mention has already been made (*supra* pp. 9, 20) of the opinion's statement that

> " . . . plaintiff is to be severely condemned for making unsupported charges against Government officials and employees who were doing their duty."

Elaborating on that statement, the opinion goes on to say, (R. 177, p. 17):

> "Plaintiff has failed to prove that any official or any group of officials of the Department of Agriculture set out to wreck its business. It has failed to prove that any of them were arbitrary or capricious in their dealings with it, or in their conduct toward it; nor has it proved that any inspector was guilty of fraud in the grading of its eggs or did so improperly."

It is undisputed that the Tri-State Marketing Plan, which was destroyed by the assignment of Schoonover as a replacement grader, was highly successful from the very beginning after two years planning and organization by Mr. Nichols. Even including the latter part of the period of the Plan's operation when Schoonover caused it to operate at a loss, it yielded profits at an annual rate of approximately $40,000.00, and was a growing success up to the advent of Schoonover. The Commissioner so found, and defendant took no exception. (R. 156-158)

The opinion (App. 20) describes petitioner, in a fit of pique, in April of 1955 as having "decided to go out of business unless it could continue with the grading service it demanded." Having been denied "the terms upon which it wished to continue . . . " there and then, according to the opinion, petitioner by free choice, ended the business

[1] The record, and even argument by counsel fail to contain even a hint that such a charge was made in the course of the trial sessions. Petitioner cannot account for this statement in the opinion.

of three generations of the Nichols family, and the fruit of two years advance preparation and planning of the Tri-State Marketing Plan.

That conclusion is hardly consistent with the undisputed fact that petitioner continued in business for several years after its grading service contracts were cancelled (R. 158); nor is it consistent with representations by respondent's counsel to the Court in oral argument in November of 1961, that petitioner was on that very day still in business. (*Supra* p. 16) It is opposed by the findings of the Court, adopted verbatim from the Commissioner's report, and which the Commissioner in his report summarized by stating:

> "It thus appears that (USDA) was not only inviting plaintiff to terminate, but was in reality forcing plaintiff to terminate the service contracts."

This Court's rules require the opinion below to accompany a petition for certiorari, no doubt on the assumption that the opinion fairly reflects the case to be presented. While petitioner is not asking review of an opinion, the opinion may well vitally affect the Court's decision to review. The foregoing discussion of the opinion, therefore, is pertinent, as are the accuracy of the true facts as set forth specifically herein (*Supra* pp. 21-24; *infra* pp. 28-56).

### E. The True Facts—Count I

#### 1. Storage lots were of uniform and comparable quality

Petitioner had available to fill the contracts 117 lots, officially graded when stored. The USDA conceded the lots were of "high quality." (App. 38; Def. Ex. 2, p. 8)

Petitioner's eggs thus differed from eggs normally stored, which are generally upgraded current receipts, (run-of-the-mill). (App. 49) Good eggs do not deteriorate

very much while in storage, but poor quality eggs continue to deteriorate. (App. 47)

As the September 2, 1952 delivery date approached, petitioner checked on all the lots in storage, partially re-working them, and was satisfied that they would pass inspection. (App. 38, 39)

All of the lots stored were of uniformly high quality, with only slight variation, as shown by the certificates issued at time of storage. Such a finding was implicit in the comparisons made by the Commissioner's report of gradings at Peoria and elsewhere, since unlike commodities would not be comparable. Petitioner, nonetheless, by exception to the report, asked that this implicit finding be made explicit. (Pl. Excep. pp. 25, 26)

Extensive analyses of the quality of lots when stored were received in evidence and are undisputed. (Pl. Ex. 13 pp. 8-10; Pl. Ex. 189-196; Tr. 274-301) The lots which McCurley and Young rejected, knowing them to be petitioner's, were slightly superior to the lots they accepted without such knowledge, and other lots accepted elsewhere.

**2. Court's failure to find comparable quality**

Nonetheless, the Court made no ruling on plaintiff's exception asking for an explicit finding on this point. Instead the opinion speculated, as possibly accounting for the variations in inspection results, that (App. 6):

> " . . . perhaps the quality of the eggs offered was not the same."

**3. Mr. Curley's solicitation and threat**

Shortly before eggs were tendered for delivery McCurley told Nichols that he was going into the retail poultry and egg business at Springfield, and asked Mr. Nichols to fur-

nish him poultry and eggs "on credit." Mr. Nichols replied that he did business only on a cash basis. (App. 39)

It was not long after that McCurley told Mr. Nichols that storage eggs could not meet the requirements of the contracts. (App. 39)

The Court's findings on these conversations contain inaccuracies which conceal their vital significance. According to the Court, McCurley predicted that storage eggs would not meet the contract standards "without complete reworking". (App. 39)

The statement by McCurley that storage eggs would not pass inspection is based upon testimony of Mr. Nichols and Mr. Altheid, petitioner's plant manager. (Tr. 462-464; Tr. 346-348); a contemporaneous memorandum by Altheide recording McCurley's statements (Pl. Ex. 19-A; Tr. 348) and petitioner's early telegraphic complaint to the USDA about McCurley's grading. (App. 44, 45). In every instance, McCurley's prediction is described by the evidence as without qualification. McCurley made a flat prediction, saying nothing about reworking.

McCurley testified emphatically that he had made no statement of any kind concerning the difficulty of meeting the contract standards with storage eggs. (Tr. 840).

McCurley's testimony, instead of supporting the Court's neutralization of his threat, is demonstrated false by the Court's findings of the opposite.

The Court's finding is also ambiguous and misleading in that it fails to give the sequence of the two conversations, stating merely that they occurred, at "about the same time". All the evidence behind the finding shows that it was only after Mr. Nichols refused to sell his merchandise "on credit" that McCurley said the contract requirements could not be met. (Tr. 462-464)

**4. Results on initial tender conclusively prove fraudulent grading**

After petitioner had tendered 47 lots for inspection, some under contracts in the name of its broker, Sol Rich & Co. (App. 39), McCurley, after petitioner's initial tender of 47 lots, asked Mr. Nichols why petitioner was tendering eggs under the Rich Contracts. (App. 39)

As he knew Mr. McCurley from experience, Mr. Nichols, with a wisdom proved by later events, concealed petitioner's ownership of the Rich contracts. He informed McCurley that he had sold the eggs to Rich, (which was true,) and omitted to state that he had bought them back. (App. 39)

Mr. Nichols' apprehensions were soon justified.

McCurley's first inspections were of lots tendered under the Rich contract. He gave the lie to his own statement that storage eggs could not pass inspection, by accepting 11 consecutive lots at the very outset. (App. 39, 40)

Up to this point of time, McCurley was under the belief that petitioner had no interest in the Rich contracts. The inspections began August 25. A few days later, Mr. Altheide went over to Peoria where he told McCurley that the Rich contracts belonged to Nichols. (App. 40, 41; Tr. 325, 326, 466, 467)

Immediately inspection results were completely reversed. The remaining 36 lots tendered were *all* rejected. (App. 31, 39).

The Court's findings are in irreconcilable conflict. The initial 11 acceptances under Rich contracts are without dispute in the evidence. Yet the Court, on its own initiative, and without any basis in exceptions or evidence, made a finding that *only one* lot in the name of Rich was rejected on the initial tender.

The conflict thus occurring is shown below:

| Finding Originating With Court | Court's True Findings |
| --- | --- |
| "Thirty-six of the 37 lots of eggs offered under the contracts of Sol Rich & Company for delivery at Peoria September 2, 1952, failed to meet the quality requirements specified in PY-61 and were rejected. (App. 31) | "Of the 47 lots tendered at Peoria for delivery September 2, 1952, only 11 lots were accepted under Rich contract 2732 and all other lots were rejected for failure to meet the requirements of PY-61." (App. 31) |
| | ". . . inspectors Thomas S. McCurley and Robert L. Young commenced inspections (of the 47 lots) at the Peoria warehouse about August 25, 1952. The first few lots were found of very high quality . . . By August 30, 1952, samples from 47 lots had been inspected and 38 of these lots failed to meet the requirements. (App. 40, 41). |

Clear proof of dishonest grading is supplied by the sudden reversal from 11 consecutive acceptances to 36 consecutive rejections.

Separated only by intervening knowledge of petitioner's ownership, the complete reversal leaves no conclusion possible except that the eggs were rejected *because* owned by petitioner.

**5. Demonstrated falsity of explanation by McCurley and Young**

In addition, that reversal reveals the real meaning of McCurley's advance statement that storage eggs could not pass inspection. What he meant was that *petitioner's* eggs would not pass inspection; he did not honestly believe there was any problem, as shown by his 11 consecutive acceptances at the outset.

Highly pertinent also is the falsity of the testimony McCurley and Young gave to explain this sudden reversal.

Both McCurley and Young testified that the first 11 lots were accepted because the sample cases were selected by warehouse employees rather than the inspectors and were not representative of the lot quality. (Tr. 822, 827, 828, 990) But the certificates themselves did not so indicate, as regulations require, when warehouse employees select the samples. (App. 34, 35, 41)

The falsity of their testimony was conclusively established. There was received in evidence a report from Dolson to his superior at Washington, dated September 16, 1952, shortly after the gradings on the initial tender, which stated: (Pl. Ex. 33):

> "After talking to you on the phone late yesterday afternoon I called Mr. McCurley for further information regarding the eggs being graded at Peoria for the School Lunch Program. Mr. McCurley advised me that on *each* and *every car they did draw their own samples.*" (Emphasis supplied.)

Thus McCurley and Young testified falsely in their attempt to explain the initial 11 acceptances.

### 6. Grading results elsewhere compared

Simultaneously with September 2 delivery at Peoria, petitioner tendered 8 lots at Burlington, Iowa, and 7 lots at Memphis for inspection and delivery at those places on the same date.

All 7 lots at Memphis were accepted. Only one (1) of the 8 lots inspected at Burlington was rejected. The tabulated results as of this time were as follows:

| | Acceptances | Rejections |
|---|---|---|
| Memphis | 7 | 0 |
| Burlington | 7 | 1 |
| Peoria (Before knowledge of petitioner's ownership) | 11 | 0 |
| Total | 25 | 1 |
| Peoria (When lots known to belong to petitioner) | 0 | 36 |

### 7. The gradings of Shearer and Dingman

Following petitioner's complaints to the USDA of Washington, Dale Shearer, Assistant to Dolson in Chicago, visited Peoria on two occasions on which he did grading. On one occasion he graded two lots which had been reworked, rejecting one and accepting the other. On a later visit he inspected 5 lots, all of which were accepted. (R. 45) This record of 6 out of 7 acceptances is at variance with Shearer's report that McCurley and Young were making proper inspections (App. 46), and in further contrast to the record of McCurley and Young.

The Commissioner found that the group of 5 lots were original unre-worked lots, (R. 98) and contrasted Shearer's own performance record with his testimony that re-working was required. (R. 98)

The Court modified the Commissioner's finding so as to find that the group of 5 lots were reworked. (App. 45) This modification is in conflict with other findings by the Court, showing that the lots must have been unre-worked because inspected when only unre-worked lots were available. (App. 42, 43, 45)

The Court in its opinion states (App. 6) that "No accusations are made against Mr. Shearer's integrity or im-

partiality." This statement is made following reference to Shearer's testimony that the inspectors were doing a good job in his opinion. The Court apparently overlooked the tsatement in plaintiff's reply brief in which plaintiff asserted (p. 41 fn. 1):

> "Somehow Shearer became transformed from a fair grader into a partisan witness by the time he testified."

Regulations of USDA required detailed memoranda made at the time of inspection, commonly called worksheets, to be preserved for the purpose of settling any future disputes concerning grading. (App. 37) To resolve the evidentiary issues created by the testimony of graders Dingman and Shearer petitioner subpoenaed the worksheets behind their gradings. The Commissioner made a finding to that effect (R. 98) which was unquestionably true; and also the further true fact that respondent never furnished the worksheets.

The Court for no apparent reason failed to make a similar finding. Its opinion, while stressing petitioner's failure to parate its candlers as witnesses, is equally silent about respondent's failure to produce official records made and maintained for just such an occasion, irresponsibly defended only by varied and conflicting statements by respondent's counsel, with which issue was taken by petitioner. (Tr. 1441-1447); Defendant's Requested Findings, p. 75; Tr. 1263) The failure to produce the worksheet is behind the certificate in Dingman's name is particularly strange in view of testimony elicited by respondent from McCurley and Kempers that only the worksheets would show who did the inspecting. (Tr. 859, 1187, 1194)

In view of the record it is clear that the Commissioner was right and the Court was wrong on the issue of the reworked or unre-worked character of the group of 5 lots. In any event, in view of the heavy proportion of rejections

by McCurley and Young of lots after they had been completely re-worked (51 out of 111; *infra*, pp. 37-38) Shearer's record would of 6 out of 7 acceptances provide another sharp contrast with the gradings by McCurley and Young, even if those 5 lots had been reworked.

Both the Court and the Commissioner found that Inspector William Dingman, who assisted McCurley and Young in inspecting the lots initially tendered, "signed certificates for 17 lots . . ." (R. 94, 201) The Court however in its opinion refers to "Mr. Dingman as having inspected" these lots (of which 14 were rejected) and goes on to say (App. 7) that "No accusation is made against him."

The 17 certificates issued in Dingman's name, with 3 exceptions, related to lots graded by McCurley and Young. The official certificates received in evidence so demonstrate, as petitioner pointed out to the Commissioner before he made his finding. (Objections of Petitioner to Defendant's Requested Findings (pp. 54-60)). The findings of both the Court and the Commissioner, therefore, were deliberately confined to "signing" of certificates, rather than "inspecting" the lots whose quality they certified, and the opinion's statement represents a misconception of the facts.

**8. Refusal to inspect lots not previously tendered**

Petitioner entered into various contract modifications with the USDA extending the time for delivery, with certain penalties attached. Reduction was made in the contract, increasing progressively with added delay in delivery. The penalty was a minimum of over $1,000 per day, and might exceed $4,000 per day. (App. 28-31).

To avoid the costly delay involved in reworking petitioner tendered other lots, in storage in the Peoria warehouse where the inspections were being made. McCurley refused to inspect them, and, instead required that peti-

tioner re-work the rejected lots and all other lots which might be tendered, before he would inspect them. (R. 199, 203)

This was a clear violation of the contracts which obligated the USDA to inspect lots as tendered, and expressly denied the inspectors any authority to accept or reject the lots tendered. (App. 22-26)

### 9. Refusal to reinspect

Petitioner also asked repeatedly that the lots rejected on initial tender be re-inspected, by enlarging the sample, and regarding the enlarged sample—a standard procedure authorized by regulation and part of the basic grading process.

All requests for re-inspection were denied. Petitioner was forced to and did re-work all lots (with the exception of certain lots accepted by Shearer, (discussed, *supra*, pp. 33, 34), re-work all lots of eggs as a condition precedent to their further inspection.

### 10. Inadequate justification by Court of reworking requirement

The inspections made at the time the eggs were stored show that a substantial number of the lots had loss slightly in excess of the .3% maximum loss permitted.[1] (App. 38)

The Court in its finding seeks to justify McCurley's requirement of re-workings as being based on the loss factor shown by inspections made at the time of storage. (App. 43) The opinion does the same, stating that in view of loss shown in some of the lots when stored, "It was not un-

[1] The Court's Finding (App. 38), contains even a mathematical error, adding 27 and 4 to reach a total of 40, rather than 31; in addition it treats the lots showing loss in excess of .3% as being a proportion of 59 rather than the 89 lots stored. (Pl. Ex. 186, 187, 188, 198, sheet 12)

reasonable . . . for the inspectors to require them to be reworked . . ." (App. 4)

But McCurley had no such reason. Statistical studies comparing the gradings of the lots were made up for the purpose of the case, from petitioner's records. Neither McCurley nor anyone else knew at the time of the grading, what these various percentages were. McCurley could not and did not know whether the eggs in storage had been previously graded, or where they came from, let alone the gradings given them when stored. He himself so testified. (Tr. 912)

McCurley also testified that he had never made any re-working requirement. Here again the Court's erroneous justification only points to testimony which its finding condemns as false. (Tr. 839)

### II. Results after re-working

On subsequent tenders at Burlington and St. Louis, there were a few lots rejected. After re-working, not a single one was rejected.

At Peoria, 111 inspections were made by McCurley and Young of lots completely re-worked with only 60 resulting in acceptances.[1] (Pl. Ex. 190)

[1] The foregoing figures exclude the 7 lots inspected by Shearer without re-working. The Burlington experience after the initial tender was slightly less favorable than before. This may be accounted for by the BB candler. Also the record indicates that following the initial tender Mr. Dolson looked into the Burlington situation and conceivably shaped the attitude of the inspections there. (Pl. Ex. 33) Petitioner is, however, unable to assert that there was any wrongdoing other than the use of a wrong candler, although Mr. Nichols testified that he believed the eggs should have passed and in this respect the statement in the opinion that "plaintiff does not complain" about rejections at other places (R. 165) is misleading. It is also inconsistent with its condemnation of plaintiff for making unfounded charges, petitioner had no practical way of verifying or substantiating. Petitioner is damned for making unfounded charges; when it and then damned when it doesn't.

The record is devoid of any explanation on behalf of respondent of most of the rejections of re-worked lots. (Despite all the insistence that reworking was all important).

Respondent, through testimony by McCurley, sought only to explain the rejection of 16 of 23 lots re-worked at Avon and Bushnell and returned to Peoria for inspection. According to McCurley, upon their return the lots were left in the hot sun on the warehouse unloading platform with samples taken into the inspection room for grading; this situation, according to him, being due to petitioner's desire to learn whether the lots would be accepted before bringing them into the warehouse. (Tr. 835, 836)

That testimony was demonstrably false. His own certificates of those inspections described the *lots*, not just the samples, as being under refrigeration in the warehouse. (Pl. Ex. 187) Also, all lots went into the warehouse although 16 of the 23 were rejected. (Def. Ex. 173A) McCurley would be grossly in violation of his duties to use cooled and unrefrigerated sample cases as representative of the remainder of a lot in the hot sun; and Mr. Nichols, undergoing a tremendous expense, would have been irrational to have allowed such a condition to exist, let alone direct it. Thus, the partial explanation made by respondent of the rejection of reworked lots was both false and irrational.

The results of the inspection of re-worked lots by McCurley and Young, compared to experience elsewhere are shown below: (App. 40-43)

| | Acceptances | Rejections |
|---|---|---|
| Burlington | 4 | 0 |
| St. Louis | 1 | 0 |
| Total Elsewhere | 5 | 0 |
| Total Peoria | 60 | 51 |

**12. Petitioners failure to produce its candlers and have its candlers testify**

The Court's opinion stressed the failure of petitioner to have its candlers testify, who did the re-working, stating (App. p. 6):

> "When plaintiff reworked the eggs, it was necessary to examine them, reject the 'checks' and 'dirties, leakers and loss' and candle so many of the others as it deemed necessary. Its employees who did this work were in an excellent position to testify whether or not the rejections by the inspectors had been improper, but plaintiff did not call them to testify. We regard this as quite significant."

At the time, petitioner was seeking to complete performance rather than to prepare for a law suit. The re-working was for the purpose of having the eggs accepted and the candlers, thirty or forty in number, were employed and worked for that purpose. Their testimony would naturally have been that they did the job that they were employed for. Most of the lots re-worked (60 out of 111) were, in fact, accepted despite the use of the BB candler and the obvious unfairness and dishonest grading by McCurley and Young.

It would, of course, be impossible to trace any given case of eggs candled into a given inspection even if the employees were available at the time of the trial sessions which does not appear.

Respondent apparently recognized the futility of such a parade of witnesses. By its discovery motion filed June 5, 1956 it sought all pertinent evidence relating to the quality of the eggs tendered under the contracts stating that much information was in the possession "of the candlers employed by plaintiff . . . who subsequently re-worked lots which had been rejected . . ." (Def. Motion, p. 2)

Petitioner's response made no objection. (Res. p. 1) and such discovery was had.

Petitioner was thoroughly investigated by respondent and had full access to petitioner's employees yet it called no such witnesses itself. (App. 56) The record is devoid of any consideration having been given to such a futile pursuit, except as an afterthought by respondent in its brief to the Court of Claims.

In Defendant's Requested Findings of Fact filed with the Commissioner no such point was made. Instead in a note to the Commissioner (p. 23) respondent decried plaintiff's failure "If a lot had failed to pass inspection, to have one of plaintiff's own candlers re-inspect the lot and make a note if his inspection results differed from the inspector's grade. Or, he could have simply stationed one of his candlers beside the inspector to check his results after they were arrived at."

This contention respondent abandoned before the Court, coming up instead with the new idea that the candlers should have been called as witnesses, and by petitioner.

The Court overlooks the fact that Mr. Nichols and Mr. Altheide, the plant manager, both knowing the overall situation, testified positively that the eggs should have passed inspection. (Tr. 349, 590, 592).

While stressing the failure of petitioner to call the candlers, the Court is silent concerning respondent's failure to produce official records maintained for the very purpose of providing evidence to resolve controversies concerning the fairness of egg gradings. (Supra p. 34) In fact, the Court failed to adopt the Commissioner's finding in that regard, even though indisputably true.

**13. The disputes clause and petitioner's failure to take formal appeal**

The USDA regulations regarding egg grading authorized a permissive appeal from any given official egg inspection. The regulations were general in terms, providing that the appeal grading should be made by an inspector other than the one whose grading is appealed, but contain-

ing no further information concerning the procedure used in making the appeal grading. (App. 35, 36) The Shell Egg Graders Handbook (which petitioner had not seen until some time after performance had been completed) gave more specific directions to the graders themselves.

The dis[illegible]s clause required that petitioner submit its complain[illegible] the contracting officer for decision by him (App. 27). Petitioner did so by its complaints through Washington, alleging bias and unfairness on the part of McCurley and Young and asking that other inspectors be substituted for them. (App. 44, 46)

Officials in Washington suggested that petitioner appeal the gradings by McCurley and Young. Petitioner endeavored to find out the procedure on appeal, having been told by McCurley that the inspection appealed from would be taken into consideration and be given weight in the appeal grading. (Pl. Ex. 11, 12)

The practice as at the time was to average the inspection appealed from with the inspection made on appeal the average being the final appeal grade. (Tr. 757, 758, Defendant's Requested Findings of Fact, p. 74) Thus if the initial grading appealed from should contain .8 loss, then .4 loss would inevitably be included in the final grade on appeal, even if the new sample showed no loss at all.

Petitioner unwittingly did appeal by requesting re-inspection by graders other than McCurley and Young, but made no such request formally, nor spoke in terms of "appeal." Oral requests were adequate. (App. 36, 43).

In its opinion the court stated: (App. 6)

> "(R. 166) . . . Such an appeal would have provided direct evidence of fraud, if fraud had been practiced. No appeal was taken. Instead of taking an appeal, plaintiff asked that McCurley and Young be replaced by other inspectors, but this it had no right to do, until it was shown they were acting improperly. An appeal should have disclosed whether or not they were acting improperly, but no appeal was taken."

The foregoing statement is largely without foundation. Petitioner's failure to take formal appeal, even if permitted by the disputes clause, in no way kept USDA from obtaining evidence of fraud. USDA could have taken an appeal itself and was free to investigate in any manner it saw fit. The problem of McCurley and Young was a continuing one, not confined to any specific grading, and called for the administrative correction of which the disputes clause was, by the contract terms, the mandatory remedy. The contracts did not mention the permissive appeal grading system. The investigations on petitioner's complaints was not completed until long after performance had been made. (R. 00) Petitioner was looking forward to this promised investigation of its complaints and urged haste. (P. Ex. 58)

**14. The B B candler**

The contracts of sale, by incorporating United States Standards For Quality of Individual Shell Eggs, (App. 23), also incorporated the requirement that the candler used in inspections to deliver from 350 to 450 foot-candles of light at the candler opening, that opening to be approximately 1⅛th inches in diameter. (App. 34)

After all deliveries had been made under the contracts, petitioner discovered that the USDA in all inspections at all points had used a "B B" candler with greatly excessive candle power, and concentrated the light beam unduly by an aperture opening of only 13/16th of an inch. The result was to make certain defects in the eggs more pronounced and to widen the range of flaws which can be observed. (App. 46)

Petitioner had contracted to supply eggs having a certain appearance under a certain light. Its eggs were judged under a light changing their appearance, and making flaws otherwise imperceptible become apparent, as well as mag-

nifying them. The result was to upgrade the contract specifications.

Instead of recognizing petitioner's complaint in this regard as a breach of contract, with no element of discrimination involved, the court in its opinion stated plaintiff made complaint in this regard "in order to show partiality . . ." (App. 7)

Petitioner cannot state, because of inherent impossibility, any precise or approximate measurement of the down grading of plaintiff's eggs which unquestionably took place because of the use of the B B candler. (App. 46)

### F. The True Facts—Count V

There is no genuine dispute in the evidence concerning the major facts under Count V. Differences exist between the findings of the Commissioner and those of the Court. They are caused almost entirely (with the exception of the treatment of Dolson's threat to put petitioner out of business) by the Court's failure to adopt certain findings of the Commissioner based on undisputed evidence, and to which respondent, for the most part, did not except.

The difference in the findings is in part attributable to the Court's implicit rule of law that the USDA could discriminate against petitioner by applying to it, without regard to uniformity of application to other concerns, a policy of the Poultry Branch of the USDA to have government employed graders supervise and replace licensed plant employees; and that despite the fact that this policy of the Poultry Branch was arrested and suspended by the USDA before it became effective.

In its opinion the Court ruled that petitioner had voluntarily cancelled its grading contracts (App. 20). The Commissioner found instead:

"It thus appears that the PMA was not only inviting plaintiff to terminate, but was in reality forcing plaintiff to terminate the service contracts." (R. 151)

The Court's ruling, and the Commissioner's finding set forth above, were based on correspondence between petitioner and USDA concerning which both the Court and the Commissioner made substantially identical findings. (App. 68-74; R. 150-155)

These matters are discussed specifically below.

### 1. Dolson's threat

The high-handed arrogance manifested by Dolson's denial to petitioner of grading services generally available, and promoted and encouraged by the USDA in the public interest on a self-sustaining basis, appeared once more when petitioner was barely over its troubles in making deliveries at Peoria under the contracts of sale.

Both Commissioner and the Court found that Dolson threatened to put petitioner out of business in a conversation with Mr. Nichols in his office at Avon, in the course of which Mr. Nichols had stated he intended to file a claim against the government.

The Court, in its finding, intermingles and confuses that conversation with a different incident—an argument about the denial of grading service, and petitioner's compliance or noncompliance with regulations entitling it to them.

The argument about grading service the Commissioner reported as a separate incident, and respondent took no exception. (R. 116)

Set forth below are the corresponding findings of the Court and Commissioner:

*Commissioner's Findings*

"Shortly thereafter, (November 12, 1952 (App. 32) when deliveries were completed under the contract of sale) Nichols advised Regional Supervisor Dolson that he intended to file a claim against the Government, and Dolson threatened to put plaintiff out of business by the exercise of his authority to supervise the administration of the production and marketing inspection and grading service." (R 134)

* * * * *

"On December 10, 1952, Dolson and McCurley visited plaintiff's plants at Avon and Bushnell. Dolson advised Nichols that he would get service, but that he would have to comply with regulations to the letter of the law." (R 116)

* * * * *

*Court's Single Finding*

"Following complaints from the plaintiff that the (USDA) graders were biased and prejudiced in grading eggs '. . . under the contracts . . . an investigation was made by the USDA.

"Shortly thereafter, Mr. Nichols, Mr. Altheide, plaintiff's plant manager at Peoria, Mr. McCurley, the Supervisor for the State of Illinois, and Mr. Dolson, the Supervisor for the 12-state area comprising Illinois, were discussing plaintiffs complaints. They got into quite a heated argument, Nichols charging that he had not received fair and impartial inspection, and Dolson replying that Nichols was trying to pick his own inspectors, and was trying to tell the Government what to do, but he was not going to let them do it, that he was going to tell Nichols what to do, and that he had better learn then and there that he had to do it. Nichols said he was going to file a claim against the Government, and Dolson said that he was going to put Nichols out of business." (App 56, 57)

All the evidence in the record supports the Commissioner's findings and opposes that of the Court.

The earlier conversation, in which the threat was made, occurred shortly after November 12, the date of completion of performance, rather than the later date of completion of the investigation. It was not heated. After the threat, Mr. Nichols simply walked out of the office telling Dolson,

that he felt Dolson had been trying to put him out of business for a long time before hand. The two men were alone when this conversation was held. (Tr. 487, 488)

The later conversation occurred December 10, 1952. It is evidenced by a memorandum made by Mr. Nichols, immediately after the argument, recording in complete detail what was said. (Pl. Ex. 200) That memorandum, obviously drawn upon by the Court in its vivid description of the two incidents as if one, (App. 11, 12), shows that at this time McCurley and Altheide were also present, that it was Dolson, in the company of McCurley and Altheide, rather than Mr. Nichols, who walked out of the office when the argument ended; that nothing was said about the filing of a claim; and that the controversy concerned only the question of petitioner's compliance or noncompliance with regulations relating to grading service, with Dolson insisting that the law and regulations must be met. (Pl. Ex. 200, Tr. 489-494)

As a result of confusing the two conversations as if one, Dolson's oppressive threat was transformed into a highly principled stand for law and order.

The first treatment of the two conversations in the opinion is consistent with the Court's finding (App. 72):

> "Shortly after all deliveries had been made under that program, Mr. McCurley, the Supervisor for Illinois, and Dolson, the Supervisor for the Chicago area, comprising 12 States, including Illinois, came to one of plaintiff's plants where they had a discussion with Mr. Nichols and Mr. Altheide, the Manager, about plaintiff's complaints of unfair grading. The discussion became quite heated, Mr. Nichols complaining of unfair grading, and stating that he was going to file a claim against the Government, and Mr. Dolson replying that Nichols was trying to pick his own inspectors, and that he was not going to let him run the Department, but the Department was going to tell him what to do and he had better do it or he was going to put him out of

> business." However, Nichols says, after lunch, when Dolson came back to the plant, tempers had cooled, and he acted very much like a gentleman."

Thus, according to the Court, the heat of the argument provoked Dolson into a threat related to the whole subject matter of the discussion, which included compliance with law and regulations, AS WELL AS the filing of a claim.

But even this gentle and considerate treatment the Court soon exceeded. Two pages later in the opinion, the filing of a claim is not mentioned. Instead the Court refers (App. 67) to:

> "... Dolson's remark that plaintiff had better do what the Department directed him to do or they would put him out of business—"

The Court's misconception of the true nature of Dolson's threat, as shown above, was obviously a prerequisite to its ruling that "plaintiff has completely failed to prove . . . a design" to put plaintiff out of business (App. 13).

It is a fair assumption that this same misconception colored the Court's appraisal of discrimination and retaliation practiced against petitioner following Dolson's threat.

**2. Reprisals against petitioner prior to contract termination**

The opinion further poses the question which it could have, but did not, answer, by stating: (App. 72, 73)

> "If Dolson meant to carry out his threat to put plaintiff out of business through unfair grading of its products, as plaintiff alleges, it would seem he would not have waited until April 15, 1955, to set about doing so."

The Court's own findings show that Dolson did not wait until April 15, 1955. Almost immediately petitioner's shell egg grading service was reduced and for a large part of the time completely eliminated.

Throughout most of 1952, and until January of 1953, petitioner had three full time resident shell egg graders, one at Bushnell and two at Avon.

About the end of January 1953 Mrs. Richter at Avon resigned. Petitioner immediately applied for another grader as a replacement. (App. 62)

In that same month of January 1953, McCurley took away from Mrs. Chambers her stamps and government forms, so as to prevent her from certifying the grade of shell eggs.[1] No reason was given her for this action and no complaint had been made about her services. This suspension was in violation of regulations giving a licensed grader procedural rights to notice and hearing. (App. 57, 58; R. 135, 137; 7 CFR 55.35 (1949 ed.))

On March 12, 1953, Harry Brown was suspended because of the Weinberg incident (discussed *infra* p. 50). Petitioner was left with no resident shell egg grading service at all despite its two contracts, each requiring USDA

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[1] The Court found with no supporting evidence that Mrs. Chambers was permitted to grade but could not issue grading certificates. (App. 57, 59). All the evidence in the record compels the conclusion that the Commissioner's findings on this point were correct, to the effect that Mrs. Chambers issued "dummy" certificates of no value to petitioner, as a basis for assessing and receiving administrative charges based on the volume of eggs that went through the plant but which she did not grade. (Tr. 195-197, 545-547; Pl. Ex. 184, 185, 208) (R. 134-137)

Until June 1, 1954, when Kilian was assigned to petitioner, for the most part there was no other grader available to sign certificates for gradings done by Mrs. Chambers. Kilian remained in petitioner's plant until shortly before all contracts were cancelled, and both he and Mrs. Chambers testified that he had no supervision or official relationship to her in her work of any kind. Tr. 230, 204, 205. As a consequence, even if Mrs. Chambers had been permitted to grade without issuing certificates, the inability of petitioner to obtain a certificate made that right valueless for most of the time. The Court itself found (App. 164) that Kilian "never supervised the grading performed by Mrs. Chambers."

to furnish adequate grading at the plant covered, and such service was essential to its business (App. 21). Petitioner was required to use graders, operating on a fee basis out of Springfield and Chicago, when and if available. (App. 62)

The service after Dolsons threat is summarized by the table below:

**SHELL EGG GRADING SERVICE FURNISHED PETITIONER JANUARY 1954-MAY 3, 1955 AFTER DOLSON'S THREAT OF NOVEMBER 1952.**

| Period | Number of Graders | Graders Names |
|---|---|---|
| First part of January 1953 | 3 | Chambers, Richter, Brown |
| January-March 12 | 1 | Brown |
| March 12-June 10 | 0 | |
| June 10-June 24 | 1 | Ogden |
| June 24-July 3 | 0 | |
| July 3-November 20 | 1 | Antoine[1] |
| November 20-April 1, 1954 | 0 | |
| April 1-April 14 (approx.) | 1 | Schulte |
| April 14-June 1 | 0 | |
| June 1-April 15, 1955 | 1 | Kilian |
| April 15-May 3 | 1 | Schoonover |

[1] Antoine resigned because of annoyance with constant carping by USDA officials. He reconsidered and requested reemployment. Dolson would employ him elsewhere but not at petitioner's plants (App. 63; Pl. Ex. 26), although as events proved, petitioner was to be without any shell egg grading service from Antoine's resignation from November 20, 1953, until April 1, 1954, 5½ months.

Thus, in the period March 12, 1953 and June 1, 1954—approximately 14½ months—petitioner had no resident shell egg grading service whatsoever for 9½ months approximately.

### 3. The Weinberg incident

The Weinberg incident arose out of the sale of eggs by petitioner to Weinberg Brothers, a large Chicago dealer, which were transported to Laredo, Texas. Brown had graded the eggs at Avon and a new trainee, USDA inspector Schrimsher, had issued certificates at Laredo claimed to relate to the same lots, showing them to be of much lower quality. (App. 59, 60)

Brown was investigated, suspended and persuaded to resign over a technicality, just about the time Schrimsher was promoted. No investigation was made of Schrimsher. (App. 61, Tr. 778, 1301, 1321; Pl. Ex. 38, 232)

Weinberg took Schrimsher's deposition in Laredo, where he was cross-examiner by petitioner's attorney. Thereafter the USDA forbade Schrimsher sign the deposition, even though when read back to him, he admitted his testimony was faithfully recorded. (App. 61, Tr. 381-388, Pl. Ex. 145-148, 192A)

Excusing this conduct by USDA, the Court ruled, as if it had never heard of cross-examination, (App. 16):

> "Schrimsher was Weinberg's witness, no doubt, and his testimony must have been unfavorable to Nichols. If it was never put in evidence, so much the better for Nichols."

### 4. The replacement of Kilian by Schoonover

Under date of March 23, 1955 petitioner by letter to respondent's counsel described its statistical study of egg grading at Chicago, explaining how it portrayed fraud, and asking that the schedules and study be audited and analyzed

for accuracy. (Pl. Ex. 14)[1] This fact was communicated to one Ward Wagner, Washington USDA official. (Tr. 262)

By this time Kilian had been petitioner's resident shell egg grader for about 9 months, a period of relative peace and harmony for the first time since 1952 (App. 66).

About ten days later Wagner appeared at Bushnell and Avon. He took the temperature of a lot of eggs, and his reading differed widely from an earlier reading by Kilian. Official weather bureau reports showed Wagner's reading to be radically wrong. (App. 65)

Even had Kilian been in error, such a mistake was of no possible benefit to petitioner. (Tr. 234) Nonetheless because of this incident, Dolson replaced Kilian with one John Schoonover from Chicago, around April 15, 1955. (App. 66)

### 5. Schoonover's misconduct

The opinion indicates a misconception of not only of the uncontradicted evidence concerning Schoonover and the effect his replacement had upon petitioner, but even the Court's own findings.

Before Schoonover, the Tri-State Marketing Plan was a growing success. (App. 64, 65; R. 84-86) As soon as Schoonover replaced Kilian it became an immediate failure. Schoonover did not pass a single lot of eggs (App. 67). He did little work despite the congestion in the plants resulting from his rejection of eggs sold while eggs were coming in, one day doing no work at all; and so disrupted the Tri-State Marketing plan that petitioner was forced to terminate it even before cancellation of its contracts. (App. 66-69; R. 146-151)

[1] The USDA consistently refused to verify or dispute the study. App. 39

The evidence is uncontradicted that the eggs Schoonover inspected came from the same sources, were of the same general quality and were handled the same as were the eggs marketed during Kilian's tenure (Tr. 341, 343, 409, 1524, Pl. Ex. 203).

The Court ignores all these facts; and the additional fact that Schoonover's sitdown strike gave petitioner only the appearances of shell egg grading service despite the fact it had two contracts in effect, one for each plant, and each obligating USDA to furnish an adequate number of graders.

Schoonover was an experienced egg grader, having had a long association with the industry in Chicago, working for private concerns and the Chicago Merchantile Exchange (Tr. 1012). The USDA gave him a certificate of merit for "especially meritorious service . . . beyond the normal call of duty . . . in the rapid but accurate grading of an exceptionally heavy volume of eggs under extreme pressure of time, and other adverse working conditions." Thjs especially meritorious service was performed for dealers in Chicago and the Chicago Merchantile Exchange (Tr. 1286, 1287).

In desperation, petitioner requested a waiver of service, which would have meant withdrawing Schoonover from the plant, with no USDA service, but leaving the contracts for grading service with USDA still in effect. (App. 69, 70). The terms of the contract so permitted, it being the plant operators prerogative to determine when he deemed service necessary (Pl. Ex. 40, 44; Tr. 1134, 1135, 1398, 1420, 1421). This would have permitted petitioner to continue sales, largely to the Army, with Army inspection (Tr. 536). Nonetheless, the USDA kept Schoonover in the plant until the contracts were cancelled. (App. 70, 71).

The opinion disregards these facts in their entirety.[1] (App. 13, 14)

### 6. Cancellation of contracts

The Court ruled that petitioner had voluntarily cancelled the contracts as part of a plan to go out of business. (App. 20) It has been previously pointed out that plaintiff petitioner did not go out of business and accordingly had no such plan, and that any such plan would have been irrational. (Supra)

That ruling of the Court was predicated on an excerpt from petitioner's letter of April 27. (App. 20) That excerpt, read with the rest of the letter had no such meaning; and in any event, it was followed by later telegrams, prior to cancellation, which made it clear petitioner had no such desire or intent. (App. 70-72) It was those later telegrams which caused the Commissioner to find that the notice of cancellation from USDA of May 3, 1952 "appears to completely ignor plaintiff's clarification telegrams. . ."

The Court's ruling about petitioners intent to go out of business is further contradicted by its own findings of plaintiff's immediate protest of the cancellation and negotiations carried on to obtain nondiscriminatory service. (App. 72-74)

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[1] The opinion, referring to a joint inspection made by Schoonover and Kilian, states that Kilian because jointly working with Schoonover, was guilty of fraud, as Schoonover was. The Court misconceives joint grading. One inspector, grading certain of the samples, could find enough wrong to reject a lot. The two inspectors did not each look at the very same eggs. (App. 13)

The Court further discusses Schoonover's requirement that petitioner's employees do all his work, except grading, as if that were petitioner's complaint. This was only one bit of evidence, not petitioner's complaint. (App. 14)

The artificiality of attributing the cancellation notice to petitioner' wishes, as expressed to the USDA, is shown by the fact that the contracts relating to Bushnell were cancelled as well as Avon, despite petitioner's telegram of April 29 expressly stating it wished no change (like waiver of service at Avon) with respect to the Bushnell plant. (App. 71)

The evidence is undisputed that during the furor caused by Schoonover's assignment to petitioner, petitioner's attorney at the outset contacted USDA officials in Washington to take the matter up with them; that they stated they would look into the matter; that while the flurry was going on they would not receive communications from him, and cancelled the contracts without communicating with him. Plaintiff by way of exception to the Commissioner's report requested findings to that effect (Pl. Excep. pp. 76, 77). The Court made no ruling on and apparently did not consider that exception.

**7. The refusal to reinstate the contracts on nondiscriminatory terms**

Up to the time of the termination of the contracts Mrs. Chambers had been a fully licensed bonded frozen egg grader certifying here gradings as licensed. (App. 59) From 1953 on this was the only grading service petitioner had with which there was no trouble.

USDA declined to reinstate grading service except on terms especially applicable to petitioner, and which did not permit Mrs. Chambers to grade frozen eggs, but only "to supervise egg processing operations under the contract" (App. 72-74).

The Court in its opinion justifies this proposal as embodying Instruction 918 (App. 10, 19).

That instruction was an internal one representing the views of the Director of the Poultry Branch of the production and marketing administration at the time issued, May 21, 1952. (App. 53-56)

The Commissioner found, and the fact was undisputed, that on January 19, 1953 that program was cancelled by the assistant administrator, superior to the Director of the Poultry Branch (R. 132).

The abortive program embodied in Instruction No. 918 was never made a regulation and never applied, except to plaintiff. Instead, as USDA official Miller testified (Tr. 1133) the substitute policy announced by the Assistant Administrator was followed which provided that the USDA should "maintain existing arrangements with individual plants and . . . grant new requests for service in keeping with the pattern now prevailing within the community, state or region.

It was regularly applied to petitioner to deny petitioner bonded grading service on a discriminatory basis, causing the Commissioner to award petitioner damages therefor, and to find (R. 156, 157, 64):

> ". . . PMA was imposing a policy which allowed no bonded graders for Nichols, but was not applying the same policy to other operators."

The Court for no stated reason failed to find that Instruction No. 918 was revoked. It also made no findings concerning the discrimination practiced against petitioner in refusing bonded grading service.

The proposed authorization to Mrs. Chambers permitting her to grade but not to certify quality was illusory. It was designed to relegate her to the status of a limited licensee, and apprentice under the regulations. (7 CFR 55, 34 (1949 ed.))

Those regulations required that the frozen eggs be "produced under the supervision of an inspector", and that the inspector thereafter certify their grade. Since petitioner would have no inspector in the plant, to supervise the breaking of the eggs to be frozen, the result would have been, as a practical matter, no official grading of frozen eggs.

The Commissioner made a finding concerning those regulations, which was unquestionably accurate in its quotation of them. (R. 128) That finding serves as a framework compelling the conclusion that in its contentions that bonded graders were subordinate to government-employed graders, the USDA, and the Court in accepting that contention, was confusing limited licensees with bonded graders, only the latter being in a subordinate position. The Court in its corresponding finding, omitted the Commissioner's finding with reference to limited licensees, thus leaving the situation confused. (App. 53) That omission further led the Court into assuming that the regulations were in terms which permitted government-employed graders to supervise bonded graders, consistently with the revoked Instruction No. 918 on which it relied. (App. 53)

## REASONS FOR GRANTING THE WRIT

In the decision below, the Court denied petitioner the benefit of well-established rules of law, applied as a matter of routine in favor of parties whenever invoked by the facts.

The effect of the decision is to permit the Agriculture Department to engage itself in discriminatory practices affecting the marketing of agricultural products though charged by law with the duty of preventing such practices.

The decision also permits oppressive action discriminatory in character to be visited by the Executive branch of the government on the public in violation of the legal protection afforded by the Administrative Procedure Act (5 USC 1001 et seq.).

The Court's decision was rendered in disregard of the facts, as well as accepted principles of law.

The facts thus disregarded include even those found by the Court itself.

They also include those reported by the Commissioner and facts established by undisputed evidence. In the course of its disregard of those facts, the Court also disregarded contentions of petitioner concerning the facts and their significance.

Paralleling and accentuating the error caused by its disregard of facts, were findings made by the Court, with no foundation in the evidence, having the effect of changing radically the character of other facts found by the Court.

The totality of the foregoing errors, while individually grievous, in combination, amount to a denial of the due process guaranteed petitioner by the Fifth Amendment in that

1. Petitioner was denied a full and fair hearing.
2. Petitioner was denied the equal protection of the laws.

Compounding that denial of due process, the Court expressly stated in its opinion that petitioner was to be severely condemned for making unfounded charges against government officials doing their duty.

Paradoxically, this is in itself an unfounded charge, occasioned by the Court's own denial of due process.

The Court of Claims is a Court of first instance. Petitioner has had no hearing elsewhere, the Court's decision having nullified the effect of the Commissioner's finding on the merits in petitioner's favor.

If certiorari is not granted, it will mean that petitioner and persons associated with it will have been ruined and defamed without a hearing. Moreover, the instrument to

that end will have been the very Court established by Congress to provide protection against such injustice.

The foregoing reasons for granting the writ are substantiated in petitioner's argument set forth below.

## ARGUMENT

### Recovery Under Count I Should Have Been Allowed

It is settled law that petitioner was entitled to the honest judgment of McCurley and Young, *Ripley* v. *United States*, 223 U.S. 695 (1911) and accepted by the Court of Claims. *Edwards* v. *United States*, 80 Ct. Cl. 118 (1934).

Equally well settled is the rule of law that a purchaser, who fails to comply with the contract provisions regarding inspection excuses the seller from the condition of inspection and in effect accepts the goods. *Reading Steel Casting Co.* v. *United States*, 268 U.S. 185 (1925); *Standard-Knapp Corp.* v. *United States*, 108 Ct. Cl. 270, 70 F. Supp. 132 (1947); *Heid Brothers* v. *United States*, 65 Ct. Cl. 87 (1928) and *Heid Brothers* v. *United States*, 69 Ct. Cl. 704 (1930).

The Restatement of Contracts has summarized the rules of law applicable to inspection, stating, Section 303:

> "Where a certificate (of quality) is a condition precedent to a duty of immediate payment for work, the condition is excused if (the person to make the certificate) . . .
>
> (d) fails to make proper examination of the work, or
>
> (e) fails to exercise an honest judgment . . ."

The issues of Count 1 may be simply disposed of, on the ground of the use of the B B Candler, which in effect upgraded the contract specifications.

They may also be disposed of by the refusal of McCurley to inspect lots tendered under the contract. The duty of the USDA was to inspect, and failing to do so excused petitioner performance of the condition of inspection.

## Conclusive Evidence of Fraudulent Grading

### A. The contrasting inspections

The issues under Count I may also be disposed of through consideration of facts which the Court ignored, demonstrating conclusively the lack of honest judgment by McCurley and Young.

On the initial tender of 47 lots they accepted 11 inferior lots not knowing them to belong to petitioner and then suddenly reversed themselves on learning of petitioner's ownership, and rejected 36 slightly superior lots. (*Supra* pp. 30-32).

This record of bad faith was followed by another such act, in McCurley's requirement that all lots be completely reworked before their inspection. His refusal to inspect and reinspect lots tendered by petitioner, without reworking was a breach of contract in itself, as well as an act of bad faith. (*Supra* pp. 35, 36)

Also incriminating is the inspectors' record after the lots had been reworked. (*Supra* pp. 37, 38)

McCurley and Young's grading record is in irreconcilable contrast with Shearer's gradings, and the record in other cities. (*Supra* pp. 32, 33, 37)

The Court disregared the contrasting inspection results by failing to recognize that the eggs involved were of comparable quality, with the slight differences in their quality accentuating rather than explaining the contrasts. But the undisputed evidence establishes this comparability of the lots. (*Supra* pp. 27, 28)

### B. False testimony

Further compelling evidence of bad faith is found in McCurley's consistently false testimony.

It is an established rule of evidence, logic and common sense that when a person is charged with wrongdoing, falsifies and fabricates evidence, it is because he has something to conceal; and the falsity of his testimony *is positive evidence on the issue involved. Allen* v. *United States*, 164 U.S. 492 (1896); *Stanley* v. *United States*, 245 F. 2d 427 (C.A. 6, 1957). In *Barnes & Co.* v. *Kokosoi*, 102 F. 2d 450 (C.A. 2, 1939), Judge Learned Hand stated the principle in terms of law and logic. After finding that evidence had been fabricated, he held and said (p. 453):

> "That goes much further than merely to discredit the document itself; it is positive evidence upon the very issue, and weighty evidence as well. Wigmore Sec. 278. When a party is once found fabricating or suppressing documents the natural, indeed the inevitable conclusion is that he has something to conceal, and is conscious of guilt. We so conclude here."

Indeed, it has been said that the "fabrication of testimony is always a badge of weakness in a case, and when clearly established justifies a conclusion of fraud in the entire case." *Gung You* v. *Nagle*, 34 F. 2d 848, 850 (C.A. 9, 1929). Where *fraud* is charged on the part of the person *falsifying*, the rule applies with even greater force, since he demonstrates his dishonesty by his testimony.

McCurley testified that he had not refused to inspect or reinspect lots unless reworked. The Court convicted him of falsity by finding the opposite. (*Supra* p. 37)

It is true that the Court sought to excuse his refusal to inspect by the finding (with no support in the evidence), on the ground he did so because the inspections made at the time of storage indicated *some* of the lots might not pass inspection. But that unsupported finding in no way alters the falsity of his testimony that he did *not* refuse to inspect.

McCurley further denied that he made any advance statement that storage eggs would have difficulty meeting the contract standards. The Court convicted him of falsity by finding the opposite. (*Supra* p. 29)

Again, it is true that the Court found he qualified his statement about the difficulties facing storage eggs, by saying "unless they were reworked." The finding of that qualification (with no support in the evidence at all), even if true, did not alter the fact that McCurley testified falsely in saying *no* such statement was made.

McCurley and Young both falsified in testifying that the warehouse employees had selected the sample cases for the 11 lots accepted at the outset. The falsity was shown by their own certificates, and by a written report, shortly after the inspections, from Dolson to Washington, stating that "McCurley advised me that on each and every car[1] they did draw their own samples." (*Supra* pp. 31, 32)

McCurley falsely testified that he inspected lots reworked at Avon and Bushnell by grading sample cases in the cool warehouse, while the remainder of the lots were deteriorating in the hot sun on the unloading platform. The falsity of this testimony is shown by his own certificates, describing the *lots* as being in storage at the time he graded the samples. (*Supra* p. 38)

The foregoing facts by themselves conclusively demonstrate bad faith. *None* of them are mentioned by the Court in its opinion wherein it rules there is *no* evidence of bad faith.

The Department of Agriculture is by law charged with the duty of prohibiting discrimination in the marketing of agricultural commodities (See U. S. Warehouse Act, 70 USC Sec. 241, et. seq.; Perishable Agricultural Commodi-

[1] The term car and lot are used interchangeably to describe a load of eggs.

ties Act, 7 USC Sec. 499(a), et seq.; Packers and Stockyard Act, 7 USC Sec. 181, et seq.). For the Department of Agriculture to cause discrimination rather than prevent it, would amount to a perversion of the powers of Government.

The Court of Claims has recognized that discriminatory executive action lacks validity. *American President Lines, Ltd.* v. *U. S.*, 291 F. 2d 931 (1960).

It has been shown that Instruction No. 918 was not even a program of the USDA, having been cancelled by higher authority (*supra* pp. 55, 56). It had never become a published regulation and, therefore, even if a policy, and even if also non-discriminatory, it could not serve to justify the action it espoused.

The Administrative Procedure Act invalidates such unpublished policy. Its pertinent provisions are found in Section 3(a) providing:

> "Rules.—Every agency shall separately state and currently publish in the Federal Register . . . : (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available . . .; and (3) substantive rules adopted as authorized by law . . . No person shall in any manner be required to resort to organization or procedure not so published." (5 U.S.C.A. 1002)

"Rule" is defined by the Act (Sec. 2(c), 5 U.S.C. 1001(c)) in the following terms:

> ". . . 'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to . . . or prescribe the law or policy or to describe the organization, procedure, or practice requirements of any agency. . ."

Failure to meet the above requirement invalidates an unpublished policy. *Hotch* v. *U. S.*, 212 F. 2d 280 (C 49, 1954).

**The Legal Relevance of Facts Proved Under Counts II, III and IV**

The persistent denial of petitioner's rights to grade service proved under these counts are closely allied to the pattern of conduct established under Counts I and V, with Dolson and McCurley being the culprits.

Being similar in character, and being part and parcel of the same course of conduct, those facts should have been found to prove Counts I and V. Closely in point on the facts, and approving principle of law is *United States* v. *Schiller*, 187 F. 2d 572 (C.A. 2, 1961). In that case, a criminal prosecution, one of the defendants had been a public housing official, charged with conspiracy to defraud the United States by accepting bribes. The factual issue was whether a certain "loan" was in fact a loan.

Evidence was received showing that the defender had been accepting "commissions" from prospective tenants, in violation of New York State law and rent control regulations. Relying on Professor Wigmore, the Court held and said (p. 574):

> "His testimony that he had received commissions from prospective tenants for services which were in violation of a New York penal law prohibiting excessive charges in connection with rental agreements tended to show that *he had an intention to use his office in disregard of the rental control regulations in situations like the case at bar.*" (Emphasis supplied)

Legal questions concerning this similar-fact evidence, have not involved relevancy, but competency in criminal cases: *United States* v. *Stirone*, 262 F. 2d 571 (C.A. 3, 1959).

**The Denial of Relief Under Counts II, III and IV**

Petitioner's Motion for Reconsideration explained to the Court that petitioner had not intended to and did not indicate in oral argument any weakness in Counts II, III, and IV and that there must have been a misunderstanding.

Assuming, arguendo, the propriety of dismissal of the counts had a concession been made orally as the Court believed, petitioner's Motion for Rehearing, it is submitted, should have been granted.

Rule 53 of the Court of Claims, relating to such motions provides in part:

> "(a) Grounds: (1) A rehearing may be granted, a judgment may be altered or amended, or a new trial may be granted when any party questions the correctness or the sufficiency of the Court's conclusions on its findings of fact, or desires to amend the same, or on any ground established by rules of common law or equity applicable as between private parties."

Rule 54 of that Court relating to relief from judgments provides in part:

* * * * *

> "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.: On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake. . ."

All the circumstances indicate that there must have been a misunderstanding; and that petitioner's attorney did not concede any fault with Counts II, III, and IV. It is not even contended. It is clear that, in one respect at least, that the Court went beyond anything said in oral argument, from its failure to make findings of fact under Counts II, III and IV. That error by the Court suggests that possibly the Court also erred in its understanding of the oral argument.

Rule 60 of the Federal Rules of Civil Procedure, the source of Rule 54b of the Court of Claims, has been held to authorize the vacating of a consent judgment when the attorney consenting had no authority to do so. *In Re: Gsand*, 153 F. 2d 1001 (C.A. 3, 1946).

Also to be considered are the facts proved under Counts II, III and IV showing that the bad faith exhibited by McCurley in the gradings were only part of a course of conduct which had begun months earlier and continued months later. Those facts the Court expressly disregarded in its express failure to make findings under those counts; here the failure was even greater, although not so readily apparent.

There is no doubt that the Court's ruling of a failure of proof under Count II was completely unjustified and that the Commissioner was correct.

**Count V**

Petitioner's basic substantive right to seek justice without being punished has not been challenged. It could not be challenged without shocking a normal sense of justice.

Clearly in point is the Court of Claims decision in *Blair* v. *United States*, 99 Ct. Cl. 71, 1942. There the Court, dealing with punitive reprisals for filing claims under the disputes clause, held and said:

> "Above all, there was clearly implied in such provision an obligation . . . and undertaking by the defendant not to commit or permit any act intended as punishment of the contractor for so attempting to invoke the contract provision and to follow the procedure therein provided so as to obtain a fair and impartial decision . . ."

On review, this Court modified the judgment below, but did not in any way question the principle thus expressed. 321 U.S. 730, 1943. In fact, Mr. Justice Frankfurter, dissenting in part, stated (p. 739):

> "As a reciprocal duty of the Government, the contract brings into operation the implied warranty that those who have in effect keeping the administrative machinery for settling controversies will not prevent its utilization for all practical purposes."

The evidence compels the conclusion that this oppression was visited upon petitioner.

It has been shown that Dolson's threat was directed solely to the filing of a claim, and unrelated to other matters (*supra* pp. 44-47). There is also no doubt that his threat was carried out.

The Court's own findings show that in a short time petitioner was deprived of most of its shell egg grading service without replacement, and for many months had no such service at all, although essential to its business (*supra* pp. 49, 50).

If the mere filing of a claim could so antagonize Dolson, one would expect more violent action when he learned of pending disclosure of the statistical study showing widespread fraud in Chicago, where he had his office, by employees under his jurisdiction.

No one can assert who bears personal guilt for that fraud. It is clear, however, that Dolson and McCurley bore *executive* responsibility.

The drastic action which followed is, therefore, in view of prior events, a natural development.

The quick destruction of the Tri-State Marketing Plant by Schoonover is clearly established (*supra* pp. 51, 52).

Also clear is the correctness of the Commissioner's findings that the contract cancellation was forced on petitioner. The idea of Mr. Nichols planning to go out of business while earning $40,000 a year, in his lifetime business, is preposterous. His telegrams demanding service completely negatives the notion that his prior letter could be interpreted as if a request for cancellation, even from a literary standpoint. In any event, the telegrams superseded the letter.

Further to be considered is the deliberate avoidance by USDA of contact with petitioner's attorney, while the steps leading to the cancellation were rapidly occurring. (*Supra* p. 54)

The grounds of the Court's action in upholding the discriminatory proposal for grading service after cancellation raised grave implications.

That proposal was clearly further punishment, since it would leave petitioner in a worse position than before the cancellation.

### The Denial of Due Process to Petitioner

Denial of equal protection of the laws is a denial of due process prohibited by the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

The requisites of a full hearing, also required by the Fifth Amendment, were described by this Court in its classic statement in *Morgan* v. *U. S.*, 298 U.S. 468 (1935) as follows (480, 481):

> "... Nothing can be treated as evidence which is not introduced as such ... . Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order ...
>
> "... The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous consideration which in other fields might have play ... The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

## CONCLUSION

Many of the Court's errors, standing alone, would justify the granting of the writ. Petitioner's grievances consist of the *totality* of those errors which, if petitioner's statement is true, should not occur in any civilized country.

The condemnation of petitioner makes petitioner's statement, incredible as it is, even more incredible. If it is incredible to the Court, it is even more incredible to petitioner.

Petitioner believed that the difficulties in making delivery at Peoria were the climax of its troubles. They proved anticlimax.

Petitioner believed that the oppression which it suffered for pursuing its rights were the climax. They were anticlimax to the decision of the Court and its opinion condemning petitioner for making unsupported charges against persons guilty of brutal oppression, and in effect, by virtue of the result reached, officially approving fraud, oppression, and perjury.

Petitioner respectfully submits its case to be worthy of a grant of certiorari, accepting full responsibility for the accuracy of this petition.

Respectfully submitted,

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*Attorney for Petitioner*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 418

NICHOLS & COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Washington 4, D. C.
*Attorney for Petitioner*

# In the United States Court of Claims

No. 98-54

(Decided March 7, 1962)

## NICHOLS & COMPANY v. THE UNITED STATES

*Frank J. Delany* for plaintiff.

*David Orlikoff*, with whom was *Assistant Attorney General William H. Orrick, Jr.*, for defendant.

### OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

On March 5, 1954, plaintiff filed its petition in this case seeking damages for breach of its contracts with defendant, represented by the Production and Marketing Administration (hereinafter referred to as PMA) of the Department of Agriculture (hereinafter referred to as USDA), for the sale of 118 lots, or some 58,000 cases of eggs, which defendant intended to use in connection with its school lunch program. In Count I plaintiff says some of the inspectors who graded its eggs were "prejudiced, biased, and lacking in impartiality," that they refused to inspect eggs tendered for delivery until they had been reworked, refused to reinspect them when requested to do so, used an improper candler in inspecting them, and otherwise acted in an arbitrary, capricious, and grossly erroneous manner.

Damages of $300,000 are alleged.

Its petition also contained Counts II, III, and IV, but our Commissioner has found, and plaintiff admitted, on oral argument that it had not made out a case on these counts.

Something over 18 months later, and about six months after the taking of proof had begun, plaintiff amended its petition by the addition of Count V. In this count it alleged

that the Department of Agriculture "unreasonably, arbitrarily, capriciously, fraudulently, and in bad faith", (1) failed to make an impartial investigation of its complaints of improper grading, but, instead, sought to find evidence of wrongful conduct on the part of plaintiff and its president; (2) it sought to intimidate and coerce plaintiff into foregoing its claim against an egg dealer by the name of Weinberg Bros.; (3) it failed to furnish an adequate number of graders; and (4) it "intimidated, harassed, interfered with and coerced" certain egg graders who were doing an honest job in grading plaintiff's eggs, and supplanted them with other graders who "arbitrarily, capriciously, fraudulently, unreasonably and improperly" graded plaintiff's eggs.

It further alleged that the Department on May 3, 1955, repudiated its contracts for furnishing grading service and refused to furnish further service except on terms which discriminated against plaintiff in comparison with the service furnished other dealers similarly situated.

All of this it alleges resulted in damage to plaintiff's business in the amount of $750,000.

A great deal of bad feeling has existed between the parties from the time of the first rejection of the eggs plaintiff tendered for inspection preliminary to delivery under the contracts. Plaintiff heatedly protested their rejection, charging that two of the inspectors had not acted fairly and impartially. It was not long before it charged them with conscious wrong-doing, and demanded that they be withdrawn from plaintiff's plant. Later, similar charges were made against other inspectors, and finally plaintiff alleged that the officials of the Production and Marketing Administration of the Department of Agriculture were in a conspiracy to put it out of business.

Plaintiff says one of the accused inspectors who was grading its eggs asked plaintiff's president, Mr. Nichols, if he would sell him eggs on credit, if he should decide to go into the retail egg business, and this is not denied. Plaintiff also says that when he told Dolson, the supervisor of the Chicago area, comprising 12 States, including Illinois, that he was going to file a claim against the defendant, they got into a heated argument, in the course of which Dolson said that Nichols was trying to pick the inspectors to inspect his

products, that he did not propose to let him do it, that he was not going to let him run the Department of Agriculture, but that the Department was going to tell him what to do, and that he had better do it and if he did not, he, Dolson, would put him out of business. This is not denied. The heat had not died down when the case was tried. During the trial plaintiff, or its attorney, charged one of the inspectors who testified with perjury.

In such an atmosphere, it is not easy to determine the true facts, but this we must do if we can, for, if the charges plaintiff makes are true, we have a case of outrageous official oppression, and positive dishonesty and fraud on the part of Government officers. If they are not true, plaintiff is to be severely condemned for making unsupported charges against Government officials and employees who were doing their duty.

We shall discuss Count I first. Plaintiff entered into two contracts with defendant, in its own name, to furnish storage eggs for use under the school lunch program. In addition, Rich & Company, brokers, entered into three other similar contracts on plaintiff's behalf. The terms of the contracts were exacting, and hard to comply with by the furnishing of storage eggs, which were specified by the contracts. For instance, the contracts allowed a loss factor on account of "dirties, leakers and loss combined" of only $\frac{3}{10}$ of one percent. This is only four or five eggs out of 1,500.

It was, of course, impossible to inspect every egg out of 21,000,000+, the number plaintiff was to furnish. The minimum number required to be inspected was 1,500 out of each lot of 180,000 eggs. The cases to be inspected were supposed to be selected at random by the inspectors. If the warehouse employees did the selecting of the sample, the inspector's certificate was supposed to note this fact.

When the first lots were offered for the September 2 delivery at Peoria, Illinois, only 11 lots out of 47 were accepted. The inspectors for the Department of Agriculture were Thomas S. McCurley, who was the Supervisor for the State of Illinois, and Robert L. Young. Plaintiff requested that the eggs be reinspected. McCurley told plaintiff that it was useless to do so until they had been reworked, and he declined

to do so until this had been done.[1] He stated, either on this occasion, or at an earlier time, that in his opinion it was not possible for storage eggs to meet the rigid requirements of the specifications until they had been reworked. Three other officials of the USDA testified to the same opinion. This is supported by the fact that 40 of the 59 lots plaintiff placed in the warehouse in the spring, for which certificates of inspection were introduced in evidence, showed "dirties, leakers and loss" in excess of 3/10 of one percent. Their condition did not improve with age. It was not unreasonable under the circumstances for the inspectors to require that they be reworked before they were reinspected.

The regulations permitted a dealer who was dissatisfied with the grading given to call for a regrading, or an appeal grading. Regrading consists of a reexamination of the original sample and the examination of another sample selected at random. The revised grade is the average of the two. Regrading is done by the inspector who did the first grading. An appeal grading is done by a different grader, two, if practical. The procedure is the same as in regrading. See Finding 19.

No appeal grading was requested.

Plaintiff reworked the eggs, as the inspector had insisted it should do. After having done so to the extent it considered necessary, it again offered them for delivery. Only 7 lots out of the 24 offered were accepted. This was due, in part at least, to the fact that, since there were no satisfactory facilities at the Peoria warehouse for reworking them, they were transported from the warehouse to plaintiff's plants at Avon and Bushnell, some 55 miles away, for reworking, and then brought back to the warehouse for inspection and delivery. Handling of storage eggs tends to make them deteriorate. In addition, upon return to the warehouse they were left on the loading docks for several hours in temperatures ranging from 52.7° to 83°.

Later, arrangements were made, with the assistance of a Mr. Shearer, one of the PMA officials from Chicago, to rework the eggs at the warehouse. After this had been done, 52 out of the next 82 lots offered were accepted.

[1] Reworking consisted of the removal of "checks" and "dirties, leakers and loss" and any others in which defects were discovered by candling.

A total of 165 lots were offered at Peoria before the 77 lots to be delivered there were accepted.

All contracts were fully performed on November 12, 1952. Since deliveries were due on September 2, 1952, and October 1, 1952, penalties were incurred for late delivery.

Plaintiff only complains of the regrading of its eggs which was done at Peoria. There were rejections at other places, but plaintiff does not complain about these. It says Inspectors McCurley and Young, who did most of the grading at Peoria, intentionally, arbitrarily, and fraudulently rejected eggs that complied with the specifications. If they did, plaintiff was damaged by the unnecessary cost of reworking them and penalties assessed for late delivery.

What proof does plaintiff offer to support this grave charge? Principally two things: one, that the percentage of rejections at other places was much less than at Peoria, and, second, some statistical studies it made of the grading of eggs put in warehouses in Chicago in the spring of the years 1949, 1950, 1951, and 1952, and the grading of them when they were taken out in the fall, which showed they graded higher in the fall than in the spring.

As to the latter, it is not shown that the eggs in question were plaintiff's eggs, nor that McCurley and Young had any direct connection with the grading of them, except only that McCurley was the Supervisor for the State of Illinois. It is not shown that Young had any connection with the grading of them. Nor is it shown which of the two gradings were false, the spring gradings or the fall gradings. Also, the period covered is prior to plaintiff's contracts. This testimony is of no value on the question of whether McCurley and Young were guilty of fraud in grading plaintiff's eggs.

It is quite true that plaintiff fared much better with its deliveries at Memphis, St. Louis, and Burlington than it did at Peoria. At Memphis there were no rejections. At St. Louis, one out of five lots was rejected. At Burlington, of the seven lots offered for the September 2 delivery, only one was rejected; but three of the eight offered for the October 1 delivery were rejected, a total of four out of fifteen. The Memphis eggs were shipped, nine lots from Peoria, and three from Burlington.

This indicates, but does not prove, either that the inspectors at Peoria were, at least, too strict, or the other inspectors were too lenient, or, perhaps, the quality of the eggs offered was not the same, or the inspectors at one place happened upon better samples than at another. Also, the findings show that grading is often a matter of judgment; two impartial graders might well differ in grading the same case. This is especially true here where only five eggs out of 1,500 could cause the rejection of an entire lot. The variance indicates, however, that something was wrong somewhere. It raises a question in our minds, but a question, a suspicion even, falls far short of that clear and convincing proof necessary to prove fraud.

When plaintiff reworked the eggs, it was necessary to examine them, reject the "checks" and "dirties, leakers and loss" and candle so many of the others as it deemed necessary. Its employees who did this work were in an excellent position to testify whether or not the rejections by the inspectors had been improper, but plaintiff did not call them to testify. We regard this as quite significant.

The regulations provided for an appeal from gradings which the egg dealer thought were improper. Where such an appeal was taken, the Department was required to have a different grader reexamine the samples inspected and examine other samples selected at random from the eggs offered. Such an appeal would have provided direct evidence of fraud, if fraud had been practiced. No appeal was taken. Instead of taking an appeal, plaintiff asked that McCurley and Young be replaced by other inspectors, but this it had no right to do, until it was shown they were acting improperly. An appeal should have disclosed whether or not they were acting improperly, but no appeal was taken.

Although plaintiff did not take an appeal, nevertheless Dale H. Shearer was sent down from the Chicago headquarters to investigate plaintiff's complaints. He rechecked a number of the lots and found the samples substantially the same as the inspectors had graded them. Also, he checked two lots that had been reworked and accepted one and rejected the other. No accusations are made against Mr. Shearer's integrity or impartiality.

Besides McCurley and Young, a Mr. Crosson, and a Mr. Dingham also inspected some of the lots offered. Of the 17 lots inspected by Mr. Dingham, 14 were rejected. No accusation is made against him.

In order to show partiality, plaintiff complains of the use of a BB candler, instead of the normal Faris candler. If a reflector is used with it, a BB candler is capable of giving a much brighter light than the Faris candler.

For two reasons this would seem to be no ground for complaint. First, any candler that is used must be one that will disclose defects within the interior of an egg. Its light must be bright enough for this. A brighter light does not disclose more defects—any candler is supposed to disclose them all; the brighter light merely makes them more readily apparent and, therefore, speeds up the work.

In the second place, this BB candler is in general use today. If plaintiff may complain of its use, hundreds of others may. We have heard of no others. It is also significant that the BB candler was used at Memphis, where there were no rejections. If it caused rejections at Peoria, it would seem it would have caused them at Memphis.

When we weigh the evidence pro and con, we must conclude that fraud in the grading of plaintiff's eggs has not been proven. In spite of McCurley's inquiry of Nichols about sales of eggs to him on credit, and Dolson's remark that plaintiff had better do what the Department directed him to do or they would put him out of business—in spite of this, we think that the most that can be said is that the inspectors required strict compliance with the contracts. We are not convinced that the inspectors required more than their duty demanded. Out of 86 lots rejected, 83 were rejected because the "dirties, leakers and loss" exceeded $^3/_{10}$ of one percent. Since most of the initial offerings were of eggs that had not been reworked, and since the certificates issued when the eggs were put in the warehouse in the spring showed "dirties, leakers and loss" in excess of $^3/_{10}$ of one percent, in the case of 40 lots out of 59, it is not surprising that later that fall 83 out of the 165 offered should have shown "dirties, leakers and loss" in excess of $^3/_{10}$ of one percent.

Count I of plaintiff's petition will be dismissed.

*Count V.*

Plaintiff claims in this count that officials of the United States Department of Agriculture, in reprisal for its making a claim against defendant for breach of its contracts to furnish eggs under the school lunch program, discussed under Count I, set about to destroy its business. It alleges it undertook to do this by failing to furnish the grading service it had contracted to furnish, and by arbitrary, capricious and fraudulent gradings by some of its inspectors, and by harassing, intimidating and coercing others.

On various dates prior to April 1, 1954, plaintiff and defendant entered into contracts for the grading of plaintiff's products. These were supplanted by four contracts entered into on April 1, 1954. These contracts were on printed forms and were substantially the same. All of them read, in part, substantially as follows:

> It Is Agreed That:
>
> (a) PMA will provide an adequate number of graders to perform the grading service covered hereby;
>
> (b) At the sole discretion of PMA the graders may be either a Federal or State employee or a licensed employee of the applicant;
>
> (c) PMA shall not be responsible for damages accruing through any acts of commission or omission on the part of any grader;
>
> (d) The provisions hereof shall continue in full force and effect from its effective date until suspended, withdrawn, or terminated, by (i) mutual consent of the applicant and PMA; (ii) written notice given by either party to the other to take effect on a specific date not less than 30 days from the date of the giving of such notice; (iii) one (1) day's written notice by PMA to the applicant, if the applicant fails to honor any invoice within thirty (30) days after date of invoice covering the cost of the grading service as herein provided; or (iv) termination of the services requested herein pursuant to the provisions in the following paragraph (e);
>
> (e) The services to be rendered hereunder shall be terminated by PMA at any time PMA, acting pursuant to any applicable laws, rules, or regulations, debars the applicant from receiving any further benefits of the service, or the services hereunder may be suspended or terminated at any time PMA concludes that the applicant has not conformed, or cannot conform hereto; * * *

Coincident with the execution of the four contracts on April 1, 1954, the following memorandum of agreement was also executed by the parties:

In order to have a mutual agreement as to the conditions under which service is being furnished, we request your concurrence to the following items:

1. Mr. Schute will be the grader in charge and inspector of egg products in charge for all contracts in effect in your plants at Avon and Bushnell, Ill.

2. A bonded assistant will assist Mr. Schute at Bushnell.

3. Mr. Schute's headquarters will be Bushnell.

4. Mr. Schute's normal hours of duty will be from 7 a.m. to 12 noon and from 1 p.m. to 4 p.m. Monday thru Friday. We do not expect him to work overtime except on official work. His annual and sick leave will be in accordance with the cooperative agreement between the U.S. Department of Agriculture and the Ill. State Department of Agri.

5. All official travel of Mr. Schute is by direction of his supervisor. It is understood that he may travel between Bushnell and Avon as directed by you. Such travel will be charged to you at the regular Federal rate and is payable to the Treasurer of the United States upon presentation of a proper billing by the Grading Service.

6. You are to furnish both graders adequate facilities. These are (but not necessarily limited to):

a. metal locker with lock.
b. individual egg scale with test weight.
c. scale for weighing 15 dozen eggs.
d. B. & B. candling light—this is the only light to be used in making official gradings.
e. thermometer for taking indivíual egg temperatures.
f. a satisfactory darkened inspection room to grade shell eggs.

7. Mr. Schute may only take technical direction from his Departmental supervisors. If you question his decisions, gradings, or inspection, you may appeal these in accordance with the regulations of the Secretary of Agriculture part 55 and part 70, copies of which you have. Such appeals may be directed to Mr. McCurley, Mr. Dolson, or the Washington Office of the Grading Service.

8. In accordance with your request, Mr. Schute will make routine comments to the person in charge of the

work assignment, however, major comments will be made to you or your Son.

9. When you begin grading at Avon, Mr. Schute will review the work of each candler with the thought of selecting a bonded assistant for that plant should the volume handled be such that you desire a bonded assistant for that plant.

Prior to the school lunch contracts, the PMA, on May 21, 1952, issued Instruction 918(PY)-4, which was sent to all dealers holding contracts for inspection and grading services. It read:

EMPLOYMENT OF RESIDENT GRADERS WITH STATUS OF CIVIL SERVANTS

I. PURPOSE

This instruction is issued as a guide in carrying out established policies in the rendering of grading service with respect to poultry, eggs, and egg products through use of civil servant licenses on Federal or State payroll.

II. PROCEDURE

A. At least one grader, who has the status of a civil servant (State or Federal) will be stationed in any one plant for each operating shift, regardless of the number of types of grading service requested, except that additional personnel may be stationed at a plant when the regional supervisor deems it necessary to properly carry out the department's responsibility. Alternate or assistant graders may be provided by licensing bonded employees. Final check gradings shall be made by the civil servant grader, and all certificates issued will be signed by him. However, bonded graders may perform final check grading, and issue and sign certificates in cases of emergency leave or sickness on the part of the civil servant employee.

B. The foregoing procedure will be followed as expeditiously as possible with due consideration to operating and administrative problems in connection with the recruitment and training of such individuals. As rapidly as such civil servant personnel becomes available, they shall replace bonded graders. Action should be taken immediately to effect this procedure in all cases where consumer grade labeling is being performed, and in plants where both inspection and grading services are in effect. In cases where product is identified only on the basis of institutional packs and where the services of sanitarians are required, the bonded grader and sanitarian shall be replaced as rapidly as possible.

C. Recognizing the personnel management problem where seasonal operations or small volume are involved, or where product is identified only on the basis of institutional packs, other than in eviscerating and drying plants, the continued employment of bonded graders will be considered on an individual plant basis. Prior to considering the continued use of bonded employees in seasonal or small plants, consideration shall be given to rendering service by a circuit grader or sanitarian.

D. Presently employed licensed bonded graders are an excellent source of supply for civil servant graders. Graders secured from this source should be transferred to plants other than those where they are presently employed. However, with approval of the Chief of the Inspection and Grading Division, a civil servant grader may be stationed in the same plant where he has been employed under bond, provided his services as a bonded licensee have proven excellent in all respects.

On July 18, 1952, this was followed by another memorandum, enclosing a copy of Instruction 918, which explained its purpose. It was explained that reasons for establishing this policy included (1) some objections on the part of the industry that licensed bonded company employees could not perform as unbiased a job as civil service employees; (2) complaints had been received from livestock sanitation officials, Public Health officials, and Food and Drug Administration officials who urged that the term "Government graded" by licensed graders other than Federal or State employees be discontinued; and (3) it would be in the public interest to proceed toward the elimination of the use of bonded graders on as practical a basis as possible as soon as feasible.

The question before us is whether defendant breached its contracts by failing to furnish sufficient graders, and by failing to give fair and impartial grading service. In considering the facts plaintiff advances in support of its charges, we should bear in mind the colloquy between Nichols and Dolson, after the school lunch program contracts had been fully performed, which we related in discussing Count I. Shortly after all deliveries had been made under that program, Mr. McCurley, the Supervisor for Illinois, and Dolson, the Supervisor for the Chicago area, comprising 12 States, including Illinois, came to one of plaintiff's plants where

they had a discussion with Mr. Nichols and Mr. Altheide, the Manager, about plaintiff's complaints of unfair grading. The discussion became quite heated, Mr. Nichols complaining of unfair grading, and stating that he was going to file a claim against the Government, and Mr. Dolson replying that Nichols was trying to pick his own inspectors, and that he was not going to let him run the Department, but the Department was going to tell him what to do and he had better do it or he was going to put him out of business. However, Nichols says, after lunch, when Dolson came back to the plant, tempers had cooled, and he acted very much like a gentleman.

How does plaintiff support its charge of unfair and fraudulent conduct, on the part of defendant's graders and their superiors, and its charge of a failure to furnish sufficient graders?

Plaintiff had two plants, one at Avon and the other at Bushnell, both in Illinois. Mrs. Anna Chambers had been plaintiff's employee for 20 years and was supervisor of the egg room at the Bushnell plant. She had been licensed by the PMA to grade her employer's product, and was bonded to faithfully discharge her duties. She served in this dual capacity from January 1952 to May 1955. Mrs. Zenna Richter was also plaintiff's employee and a licensed bonded grader at the Avon plant from January 1952 to January 1953.

On May 10, 1952, one Harry J. Brown, a Government employed NACC [2] grader, was assigned to the Avon plant and remained there until June 12, 1953. He also graded eggs at the Bushnell plant. He was succeeded by Julius Antoine, who served from July 7, 1953, to November 20, 1953. Ray Schute served during April and May 1954, Vitold Kilian from June 1, 1954, until April 18, 1955, when he was succeeded by John W. Schoonover.

Notwithstanding Dolson's threat to put plaintiff out of business in the latter part of 1952, plaintiff does not assert that any of the foregoing inspectors failed to render fair and impartial service. It concentrates its fire on John W. Schoonover, who arrived on April 15, 1955. If Dolson

[2] An NACC grader was an employee either of the USDA or of a State.

meant to carry out his threat to put plaintiff out of business through unfair grading of its products, as plaintiff alleges, it would seem he would not have waited until April 15, 1955, to set about doing so.

Plaintiff alleges that Mr. Kilian was replaced by Schoonover pursuant to the design of the officials of the PMA to wreck plaintiff's business, but plaintiff has completely failed to prove such a design. It reiterates over and over that there was such a design, but evidence to support the charge is lacking.

Kilian was transferred to another post on the order of Ward Wagner, the Assistant Chief of the Inspection and Grading Division in Washington. While on a trip to review egg processing operations in Illinois, Indiana, and Missouri he called at plaintiff's plant, accompanied by McCurley, the Supervisor for Illinois. While there he saw half of a lot of eggs stacked on dollies outside the cooler, which had been marked for delivery on an Army contract. He took the temperature of the eggs and found that it was from 68° to 70°. The Army contract required that the eggs be kept at a temperature under 50°. Kilian had recorded the temperature at 46° to 49°, but he took this temperature prior to their being loaded on the delivery trucks, contrary to the Army contract. This was said to be the reason for transferring Kilian. There was a lot of controversy about which temperature reading was correct; but, so far as we are concerned, it makes no difference. It proves nothing in support of the charge of a design to wreck plaintiff's business. Anyway, it was Wagner who transferred Kilian, not Dolson. Wagner did not order Schoonover to replace him. This was done by Dolson. There is no proof that Wagner and Dolson conspired to wreck plaintiff's business.

Plaintiff says that Schoonover fraudulently rejected eggs that should have been accepted, but the proof does not sustain this. Upon arrival, Schoonover and Kilian jointly inspected two lots, both of which were rejected. Plaintiff does not show that they should have been accepted. Plaintiff believed in Kilian and complains that he was not permitted to remain as the inspector at its plants. If Schoonover practiced a fraud in rejecting these two lots, Kilian was also guilty of fraud. Schoonover also participated in the inspec-

tion of seven other lots, two of which he inspected by himself. These were rejected. There is no proof that they should have been accepted. Plaintiff took an appeal from Schoonover's gradings on one lot. Since this lot was destined for the Army, the appeal was decided by the Army Veterinary Corps, not by the USDA. A Colonel Gould and Captain Bland reinspected the eggs. They sustained Schoonover. Plaintiff never appealed any other gradings by Schoonover.

Plaintiff complains that Schoonover would not pull out the cases of eggs, but required its employees to do so. This hardly shows fraudulent conduct. Schoonover explains that this was necessary because the eggs were packed so closely that none of the cases, except those on the front of the stacks, could be inspected without moving a number of them. Careful inspection required that samples be selected from various parts of the lots. This could not be done without moving many of them.

It seems to us this is a trivial complaint.

Our Commissioner found that Schoonover asked Altheide, the plant manager, if he could bring his tape recorder to the plant and listen to the music. Mr. Nichols so testified, but Schoonover denied it. We have made no finding on it, because, whether he did or did not, it has no probative value. We relate it only because this incident and the repossession from Mrs. Anna Chambers of the stamp used in certifying eggs was the immediate occasion for Mr. Nichols' order to Schoonover to get out of his plant and to stay out. Schoonover got out, but returned the next day, but Altheide, the plant manager, told him he would not be permitted to make any more inspections. Accordingly, on the instructions of Mr. Dolson, Schoonover picked up all Government property used in grading eggs and left, on May 3, 1955.

All of the foregoing relates primarily to the Avon plant. As stated, Mrs. Anna Chambers, plaintiff's employee, had been licensed by the PMA to inspect and grade plaintiff's eggs. She did so without interruption until January 1953. After that date she was permitted to inspect eggs, but the certificate showing their grade had to be signed by the NACC grader. Nichols requested that Brown, the NACC grader at Avon, be transferred to Bushnell, but McCurley, the State Supervisor, declined to do so. Instead, he offered to employ

Mrs. Chambers as a PMA grader, but this was not done. Later, she was authorized to resume grading service at the Bushnell plant and to issue a certificate reading:

> ABOVE EGGS PACKED IN ACCORDANCE WITH OFFICIAL GRADING UNDER CONTINUOUS SUPERVISION, AND ARE COVERED BY WORK SHEETS ON FILE.

It was, of course, within the discretion of the USDA to permit or to forbid a grader other than a Government or State employee to issue a certificate. The policy set out in Instruction 918, quoted *supra*, was to dispense with all graders other than civil servants as rapidly as possible, and to require bonded graders to work under the supervision of a NACC grader. Plaintiff cannot complain of the restriction imposed on Mrs. Chambers' activities and of the requirement that certificates be signed by a NACC employee. Apparently there was no difficulty in getting them signed by the inspector at Avon or by some other inspector, because Mrs. Chambers says the suspension of her right to issue certificates did not interrupt plaintiff's business.

There was an interval, the duration of which is not shown, when there was no grader at the Bushnell plant, but plaintiff makes no claim for damages based alone on this alleged breach nor offers any evidence from which any estimate of the damages sustained, if any, can be made.

In order to show discrimination against it, plaintiff presented a comparison of the number of bonded and NACC graders within the area in which plaintiff did business, for the years 1951 to 1956. This showed a decrease in the number of bonded graders and an increase in NACC graders, the greatest difference occurring in Iowa, and the lesser in Illinois. See Finding 47. This decrease in bonded graders and increase in NACC graders was in line with the policy set out in Instruction 918, quoted *supra*. This was first published prior to plaintiff's controversy with the USDA and was of application throughout the United States. We do not think this is evidence of discrimination against plaintiff. If the supplanting of bonded graders with NACC graders is evidence of discrimination, it is the dealers in Iowa who have reason to complain.

Plaintiff makes a good deal of the so-called Weinberg incident. In the latter part of 1952, plaintiff sold two lots of eggs to Weinberg Bros. of Chicago, to be shipped to the Cantu Fruit Company of Laredo, Texas. Harry J. Brown, an NACC inspector at plaintiff's Avon plant, inspected the eggs, and graded one lot as 79.74 percent B quality, and "loss" 1.87 percent, and the other as 78.2 percent B quality, and "loss" 2.2 percent. When they arrived at Laredo they were graded by one Schrimsher, another NACC inspector, both lots as, "no grade", and the "loss" on one lot as 62.4 percent, and, on the other, as 17.7 percent. (Any lot containing more than 5 percent loss was graded "no grade." The highest grade was United States Grade AA, the next, U.S. Specials, the next, U.S. Grade A, then, in order, Procurement I, Procurement II, Procurement III, Procurement IV, U.S. Extras, U.S. Grade B, U.S. Standards, U.S. Grade C, U.S. Stained, U.S. Trades, U.S. Dirties, and U.S. Checks. When eggs did not meet the standards of any of these grades, they were rated "no grade".)

The consignee at Laredo refused to accept the eggs and returned them to Weinberg Bros. in Chicago. Weinberg asked Dolson, whose office was also in Chicago, to send over an inspector to inspect them. For some reason Dolson himself came over and Weinberg says he pronounced the eggs, "rotten". Weinberg refused to pay for them. Nichols said he told him he had the USDA officials behind him. One would suppose that he was referring to Schrimsher's certificate and Dolson's statement that the eggs were rotten, but Nichols says it shows the PMA was trying to put him out of business. We do not draw such an inference.

Nichols brought suit. Schrimsher's deposition was taken, presumably by Weinberg, but, when presented to him for signature, he refused to sign it, upon advice of his superiors, because a copy of it was not furnished him. Whether he was justified in doing so, we do not know, but how this prejudiced plaintiff, we are unable to see, nor can we see how it shows discrimination against it by PMA. Schrimsher was Weinberg's witness, no doubt, and his testimony must have been unfavorable to Nichols. If it was never put in evidence, so much the better for Nichols.

In a note to his finding 86, the Trial Commissioner says Schrimsher was recommended for his job at Laredo, Texas, by one Frank J. Santo at Des Moines, and he quotes a letter written Santo by Schrimsher's supervisor at Dallas, Texas, in which he says Schrimsher "did a wonderful job in his testimony." We have omitted this from our findings, because we cannot see how it can possibly have any probative value.

As a result of this incident, Harry J. Brown was investigated, and plaintiff says this shows discrimination against it. Brown admitted he had been negligent, that he had not locked up his grading stamps, as required, but had left them in his car, and that the cases delivered to Laredo, Texas, were not the same cases he had stamped in Ayon. He also admitted to having signed work sheets of some other person as having been his own. Formal charges were preferred against him. He did not demand a hearing, but resigned.

Thereafter, he was employed by plaintiff.

Plaintiff has failed to prove that any official or any group of officials of the Department of Agriculture set out to wreck its business. It has failed to prove that any of them were arbitrary or capricious in their dealings with it, or in their conduct toward it; nor has it proved that any inspector was guilty of fraud in the grading of its eggs or did so improperly.

Finally, we come to the question of the cancellation of plaintiff's grading contracts.

On May 2, 1955, plaintiff wrote its associated dealers, for whom it was acting as their marketing agent, stating that it intended to dispose of its plants as soon as possible, and it suggested that they find other marketing outlets.

At about the same time, plaintiff wired the Deputy Chief of Dairy and Poultry Inspection Service of PMA in Washington demanding the replacement of Schoonover and stating that unless this was done and immediate cooperation was received, it would be necessary to cease operations. Two additional graders were requested by April 25. On April 25, L. W. Fletcher of the Washington office wired plaintiff that two additional graders could be furnished at $4 per hour and expenses. The following day, Mr. Hamann, Chief of the Inspection and Grading Division of PMA at Washington, wired plaintiff that it considered Schoonover's serv-

ices satisfactory, but it would assign two additional inspectors to plaintiff's plant, if desired. The telegram concluded: "* * * If you wish to apply for cancellation without consideration to the 30 day clause we will consider your application on this basis."

In reply, plaintiff wrote Mr. Hamann a long letter, the thirteenth paragraph of which reads:

> 13. We are left no alternative from your telegram but to accept the present grader Mr. Schoonover or request cancellation; It is impossible for us to accept the present grader under the circumstances either physically, financially, or mentally and altho we would like to receive the service on the proper basis and do not wish same must request immediate cancellation unless given reconsideration by yourself or a superior. This is of course with waiver of the 30 day clause as the extra charges and loss now incurred are more than we can absorb.

In conclusion plaintiff's president, Nichols, said: "I am tired and feel that fighting government bureaucracy is an unsurmountable obstacle. Unless you reconsider and give us the cooperation and service we need and desire please cancel the service as soon as possible."

On April 29, apparently before receipt of plaintiff's letter of the 27th, Hamann wired plaintiff:

> Reference your wire to Herman Miller April 22, 1955 your letter handled [sic] to L. Fletcher April 25, 1955 and our wire to you April 26, 1955. Please clarify your statements requesting waiver of service and discontinue our present business do you desire to cancel your contracts for grading service and request that we waive the 30 day cancellation clause please advise immediately.

In reply, on the same day, plaintiff wired Hamann, in part, as follows:

> * * * meantime our dealers met and are desirous continuing business if possible please read our letter 27th and advise accordingly suggest you give serious consideration to reconsidering entire situation before making a decision and consider replacing present inspector with one from some country point that has had no contact personally or otherwise with Dolson or Chicago situations and one who is in a position to give fair and impartial gradings * * *.

After receipt of plaintiff's letter of April 27, Hamann wired plaintiff on May 3, 1955, as follows:

> As requested in your letter of April 27, 1955 and because of actions taken by you and Mr. Altheide on May 2 and 3 in barring Schoonover from your plant all contracts for grading services with the Agricultural Marketing service to be furnished at Avon and Bushnell are hereby cancelled, effective close of business May 3, 1955 the acceptance of your notice of cancellation of contracts does not affect your privilege of requesting non-contract grading under the regulations.

Plaintiff protested the cancellation of its contracts. Hamann replied as follows:

> Reurtel May 4 my wire to you April 26 advised we did not consider Schoonover as having been negligent his performance of duties since you asked him to leave plant afternoon of May 2 and Altheide advised him May 3 that his services not wanted cancellation of your contracts effected in compliance request contained in item 13 page 6 your letter April 27.

Plaintiff began negotiations for the reinstatement of its contracts. Defendant declined to reinstate them, but on June 15, 1955, offered plaintiff a new contract on the same terms and conditions as the old ones, but with the understanding that Mrs. Chambers would be licensed, but that there would be a final inspection by an authorized Federal or State employee, who alone was authorized to issue a certificate. This proposed contract differed from the old ones only in that it incorporated in its terms the policy announced in Instruction 918, *supra*. Plaintiff declined to accept it, for the primary reason, apparently, according to plaintiff's brief, that Mrs. Chambers was not to be permitted to issue certificates as a bonded grader, but that all certificates had to be issued by a PMA employee, which plaintiff said would put plaintiff under the complete control of Dolson and McCurley.

It would seem that what Nichols said at the conclusion of plaintiff's letter of April 27, 1955, was true, to wit:

> I am tired and feel that fighting government bureaucracy is an unsurmountable obstacle. Unless you reconsider and give us the cooperation and service we need and desire please cancel the service as soon as possible.

From the foregoing recitation of facts it appears that plaintiff had decided to go out of business, unless it could continue with the grading service it demanded. In its long letter of April 27 plaintiff set out its grievances, real or fanciful, stated the terms upon which it wished to continue, and stated that if this was denied it, it "must request immediate cancellation." Defendant took it at its word, gladly, we suspect, certainly with alacrity, and cancelled the contracts. It was within its rights in doing so.

As stated, the new contract offered plaintiff was no more onerous than the prior ones, read in conjunction with Instruction 918, and required no more, as a condition of giving grading service, than was permitted by the law and regulations. It differed from the old only in that it specifically defined Mrs. Charmbers' status and that of other bonded graders, but that status did not differ from her status under the old contracts.

Plaintiff has not made out a case under Counts I and V. Its petition will be dismissed.

It is so ordered.

DARR, *Senior District Judge*, sitting by designation; DURFEE, *Judge;* and LARAMORE, *Judge*, concur. JONES, *Chief Judge*, took no part in the consideration and decision of this case.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Paul H. McMurray, and the briefs and argument of counsel, makes findings of fact as follows:

1. The plaintiff is and at all times herein pertinent was a corporation organized and existing under the laws of the State of Illinois, with its principal places of business at Avon, Illinois, and Bushnell, Illinois. The plaintiff, its predecessor company, and the Nichols family have been engaged in the poultry and wholesale egg business for many years, and during the years from 1947 to 1952 had sales of from $6,000,000 to $7,000,000 per annum. The plaintiff operated a fleet of trucks which picked up eggs from suppliers in Illinois, Iowa, and Missouri. The plaintiff was recognized as one of the largest wholesalers of eggs in the United States.

2. The Production and Marketing Administration (sometimes hereinafter referred to as PMA) of the United States Department of Agriculture (sometimes hereinafter referred to as USDA) provided inspection and grading services for egg and poultry dealers and processors whereby these commodities could be priced and traded under standardized classifications. These services were provided on a fee basis to dealers and processors having intermittent or irregular inspection requirements, and under continuing service contracts for larger dealers and processors requiring continuous service, on the basis of the cost of rendering such service. The classifications and grades under USDA standards were required on the commodity exchanges and were relied upon by the trade generally, so that it became necessary to obtain such grading service to successfully compete in the egg and poultry business.

Mr. William D. Termohlen was the Director of the PMA Poultry Branch and Hermon I. Miller was the Deputy Director. Mr. Henry G. H. Hamann was the Chief of the Inspection and Grading Division, Bernard W. Kempers was Chief of the Poultry Products Section, and Louis Ward Wagner, a marketing specialist, was Assistant Chief of the Poultry Products Section of the Inspection and Grading Division. Roy D. Flato was the contracting officer under contracts herein involved for the delivery of eggs under the USDA school lunch program and was succeeded by Brian T. Cunningham, representing the Secretary of Agriculture.

Lawrence J. Dolson was the Supervisor of the Grading and Poultry Division for the Chicago area, consisting of twelve States, including Illinois, and Dale H. Shearer was his assistant. T. S. McCurley was a Federal-State Supervisor in charge of the Springfield, Illinois office and the State of Illinois, for inspection and grading of eggs and poultry products.

3. Since, during the oral argument of this case, plaintiff conceded that it had failed to prove it sustained any damages under Counts II, III and IV, the court makes no findings of fact with respect to those counts.

*Count I*

4. The Production and Marketing Administration, USDA, by Announcement PY–61, dated April 15, 1952, offered to purchase through competitive bids approximately 500,000 cases of Government-graded oil processed shell eggs, produced in the Continental United States and packed in new cases for use in connection with the school lunch program. The pertinent provisions of PY–61, as amended, are as follows:

> The United States Department of Agriculture (hereinafter referred to as USDA) announces that it will purchase through competitive bids for future delivery, approximately 500,000 cases of Government-graded oil processed shell eggs produced in the Continental United States. Until further notice, but not later than June 24, 1952, offerings will be considered weekly covering shell eggs which at the time of delivery will grade at least 60% "A" quality, Large 45 pounds average net weight per case of 30 dozen eggs. (See Article II, Quality and Weight).
>
> To be acceptable for delivery, the shell eggs in carlot quantities must be stored in PMA-approved warehouses located in the 22 cities listed below, or in warehouses approved by PMA for the storage of shell eggs located in cities immediately adjacent to or within the switching limits of these 22 cities. Furthermore, consideration will be given to offerings in PMA-approved warehouses at any location in the United States, and acceptances will be made, providing it is to the advantage of the USDA. Prior to the time of final inspection and delivery to USDA, the shell eggs may be stored in any warehouse, whether or not approved by PMA. Shown below are the quantities proposed to be purchased in each city for delivery September 2, October 1, November 1, and December 1, 1952. While the quantities specified have already been contracted for at *some of the delivery points*, nevertheless vendors may continue to make offerings at all points listed, or elsewhere, until June 24, 1952, and acceptances will be made, providing it is to the advantage of the USDA.
>
> * * * * * *
>
> TERMS AND CONDITIONS
>
> *General:* In submitting an offer to sell, the terms and conditions of the Announcement and those set forth in

"Standard Contract Conditions", Form PMA-100, except Articles 1a, 3b, 6, 8, 9, 10, and 16, thereof, shall become a part of the offer to sell, and upon acceptance by USDA the offer and acceptance shall constitute a valid and binding contract.

ARTICLE I, QUANTITY: Offers shall consist of one or more minimum carlot quantities of not less than 480 cases (30 doz.) and preferably 600 cases. Provided, however, that failure to offer lots of more than 480 cases will not be cause for rejection.

ARTICLE II, QUALITY AND WEIGHT: The quality of the shell eggs offered shall be in accordance with the UNITED STATES STANDARDS FOR QUALITY OF INDIVIDUAL SHELL EGGS, and shall average not less than 60 percent "A" Quality. Within the maximum of 40 percent which may be below "A" Quality, not more than 10 percent may be of the qualities below "B". Said maximum tolerance of 10 percent may consist of "C" Quality, Stained, not more than 3 percent Checks, and not more than $^{3}/_{10}$ percent Dirties, Leakers and Loss combined.

In instances where the percentages of Checks, Leakers and Smashed Eggs exceed the maximum tolerances indicated, USDA will, upon receipt of satisfactory evidence of damage to eggs while in transit to delivery point, accept delivery, as hereinafter noted, at a reduction in price to be determined by USDA. A grading and weight certificate obtained at point of origin within 15 days before the date of delivery showing the lot to be within the required maximum tolerances, will be accepted as evidence of condition prior to shipment to delivery point. In no event will the eggs be accepted if the number of Checks exceeds four and one-half ($4^{1}/_{2}$) percent or, if the number of Leakers, Dirties or Smashed Eggs combined exceeds seven-tenths (.7) percent. Such adjustment in price per dozen will be made by an amendment to the contract.

Individual cases within a carlot may contain less than 60 percent, but not less than 50 percent "A" Quality eggs, except that one case in each 10 examined may contain between 40 and 50 percent "A" Quality eggs. Individual cases may contain not more than 18 percent eggs below "B" Quality, provided the average percentage for the carlot is not more than 10 percent below "B" Quality.

Eggs offered as "Large" shall have an average net weight of not less than 45 pounds per case of 30 dozen, with no case weighing less than $44^{1}/_{2}$ pounds. The average weight for individual eggs shall be at the rate

of 24 ounces per dozen, with not more than an average of 3.33 percent of the eggs in any lot weighing less than 23 ounces per dozen, and no individual case shall contain more than 10 percent of eggs weighing less than 23 ounces per dozen.

The commodity code for this grade and packing of oil processed shell eggs is: 093005.

Not to exceed two (2) per cent of the eggs may be packed small end up.

* * * * *

ARTICLE IV, GRADING AND CHECKLOADING: The official grading and checkloading shall be performed at the *point of delivery* shown in the offer by licensed graders of the Production and Marketing Administration. (PMA) and it shall be incumbent upon the vendor to arrange with the Poultry Inspection and Grading Division, Poultry Branch, PMA, for grading and checkloading services. As used herein, checkloading means that the commodity will be checked for identification, count and weight prior to transfer of title to USDA. All costs, including grading and weighing fees and expenses of graders, as well as expenses of check-loading services shall be paid by the vendor. Each case of eggs must be stamped by the PMA grader on one end with an official identification, including the USDA Lot Number, except as provided in Article VI, Para. 2.

To be acceptable, egg grading and weight certificates must bear dates *not more than 7 days prior* to the contract delivery date. Upon the completion of grading and the marketing of containers, vendors shall forward immediately to the PMA Commodity Office one copy of such certificate.

ARTICLE V, PRICES: The purchase prices are based on shell eggs packed and marked a prescribed in Article VI hereof. If, upon delivery to USDA, it is determined that the commodity does not meet contract requirements as to grade or weight, USDA, will accept the eggs and make payment according to the following schedule:

| *When the grading certificate shows the grade to be:* | *Reduction in Price:* |
|---|---|
| Between 55% and 59.9% "A" quality | Two cents per dozen. |
| *When the grading certificate shows the average weight to be:* | *Reduction in Price:* |
| Between 44 lbs. and 44.9 lbs. net per case | One cent per dozen. |
| Between 43 lbs. and 43.9 lbs. net per case | Two cents per dozen. |

Shell eggs grading below 55 percent "A" quality or 43 pounds average net weight will be rejected.

* * * * *

ARTICLE VII, DELIVERY: The shell eggs shall not be deemed ready for delivery until they are properly packed, until the Egg Grading and Weight Certificate has been issued by PMA and until they meet contract requirements in all respects. USDA will issue an order for delivery at least 10 days prior to the delivery date specified in the contract. After receipt of such order for delivery, the vendor shall effect transfer of title of the shell eggs in the warehouse on the date of delivery specified in the contract, and furnish USDA with a non-negotiable warehouse receipt properly executed as prescribed by USDA. Transfer of title shall not be made before or after the contract delivery date.

If vendor fails to make delivery in accordance with contract terms, such failure will be considered sufficient reason for USDA to proceed under the provisions of ARTICLE 7 of Form PMA–100, and USDA reserves the right to purchase the commodity elsewhere and charge the vendor any excess costs resulting from vendor's failure to deliver.

Contractor shall, at his expense, take all necessary steps to protect the product after inspection by PMA and until delivery to USDA. Such protection shall include storing of the shell eggs at a temperature of 29½° to 31° F.

The vendor will pay all in and out handling charges through the contract delivery date and for not less than 10 days subsequent thereto. USDA will not pay for charges of any kind incurred by vendor prior to the date of transfer of title.

On delivery, a plus or minus tolerance of five (5) percent in quantity will be allowed; provided, however, that no carlot quantity is less than 480 cases or more than 600 cases.

5. The pertinent provisions of Form PMA–100, entitled "Standard Contract Conditions," which was specifically incorporated in and made a part of PY–61, are as follows:

ARTICLE 2. SPECIFICATIONS: The Commodity shall meet the specifications prescribed by the Contract and shall conform to the applicable provisions of the Federal Food, Drug and Cosmetic Act, and amendments and regulations thereunder.

ARTICLE 3. INSPECTION. (a) The Commodity must be inspected after the date of the Contract and prior to delivery unless otherwise provided by the Contract. Such inspection shall be made by USDA, or by any person or agency designated by and under the super-

vision of USDA after the Contractor's request therefor. (b) If the Contractor shall request inspection of the Commodity at least 10 days before the date of delivery or the first day of the delivery period as specified in the Contract, then the provisions of Article 7 hereof shall not apply to the delay, if any, occasioned by the failure to make inspection in sufficient time to permit delivery at Time for Delivery; otherwise the provisions of said Article shall apply to any such Late Delivery. (c) For the purposes of the Contract, inspection shall not be deemed to be complete or the Commodity deemed to be inspected or ready for delivery until the inspection certificate has been issued. (d) Unless otherwise provided in the Contract (1) the cost of inspection shall be borne by the Contractor, (2) the cost of samples furnished for inspection shall be borne by the Contractor, and (3) any chemical analysis required for such inspection shall be made in accordance with the Official and Tentative Methods of Analysis of the Association of Official Agricultural Chemists in effect on the date of the Contract. (e) Inspectors are not authorized and have no authority to prescribe any changes in the Contract or to order Contractor to perform under the Contract in any particular manner. (f) Inspectors are not authorized to accept or reject commodities offered for delivery.

* * * * *

ARTICLE 7. DELAY. If the Contractor refuses or fails to perform the Contract within the time specified, or any extension thereof, Agency may, by written notice, terminate the right of the Contractor to proceed with delivery or with such part or parts thereof as to which there has been delay, and may hold Contractor for any damage caused Agency by reason of such termination. Contractor's right to proceed hereunder shall not be terminated if he gives Agency prompt written notice of such delay and the cause thereof, and the Agency determines in writing that the delay is due solely to causes beyond the control and without the fault or negligence of the Contractor, including but not limited to, preference, priority or allocation orders issued by the Government. Written notice of such determination shall be given to the Contractor. In cases of such excusable delay, the time for performance shall be extended for a period equivalent to the time lost because of the delay but not exceeding 60 days, unless Agency by a written notice to the Contractor extends the period beyond 60 days. The decision of the Agency as to cause of delay shall be final and conclusive on the parties. If performance cannot be com-

pleted within the period as extended the Contract may be terminated by Agency, without prejudice to any rights of Agency due to Contractor's breach.

* * * * *

ARTICLE 12. CHANGES AND EXTRAS. No changes in the terms and conditions of the Contract shall be allowed unless the same have been ordered in writing by the Agency and a change in price, if any, has been stated in such order.

* * * * *

ARTICLE 15. ASSIGNMENT OF CLAIMS. No claims against Agency may be assigned except in accordance with the Assignment of Claims Act of 1940. Contractor is permitted to assign the proceeds of the Contract, or any claim arising from any "Tender of Delivery" where such "Tenders of Delivery" are specifically provided for in the Contract. (31 U.S.C. § 203).

* * * * *

ARTICLE 22. DISPUTES. Any dispute concerning questions of fact which may arise under the Contract and which is not disposed of by mutual agreement, shall be decided by the officer executing the Contract in behalf of the Agency or by a designee of the Agency who shall reduce his decision to writing and mail a copy to the Contractor. Within 30 days from said writing Contractor may appeal to the head of Agency, whose decision or that of his designated representative shall be final and conclusive upon the parties. Pending decision of such dispute the Contractor shall diligently proceed with the performance of the Contract.

6. The foregoing specifications called for storage eggs of an exceptionally high quality. Its requirements were rigorous; for instance, they permitted only 5 eggs out of 1,500 to be within the classification of "dirties, leakers and loss."

7. The following "Memorandum to Contractors Under Announcement PY–61, Purchase of Shell Eggs" was issued August 12, 1952, by Hermon I. Miller, Acting Director, Poultry Branch, and reads as follows:

> This has reference to *Article IV, Grading and Checkloading*, of Announcement PY–61, under which you have contracted to deliver oil-processed shell eggs. Among other provisions, this Article specifies that you shall furnish PMA Grading and Weight Certificates that bear dates not more than 7 days prior to the con-

tract delivery date—September 2, October 1, November 1, or December 1, 1952, as the case may be. In view of the great volume of egg grading work placed on the Inspection and Grading Service just prior to these dates, and in order to give contractors ample time for candling, or for recandling operations, if necessary, it has been determined that certificates will be acceptable which are dated within 10 days prior to the respective contract delivery dates.

Vendors are reminded that all eggs must be stored at the delivery point named in their contracts in sufficient time to accomplish all grading or regrading operations, so that certificates can be issued within the 10-day period herein provided.

In case you have not arranged for PMA grading service, we suggest that you do so at once in order that we may schedule the service to meet your needs.

8. Pursuant to announcement PY-61, Nichols & Company submitted a bid on June 13, 1952, which was accepted by PMA June 19, 1952, as contract A1PM(MF)2727, for 30 lots (15,000 cases of 30 dozen each) of eggs at an approved warehouse in Peoria, Illinois, of which 20 lots were specified for delivery on September 2, 1952, at $.5250 a dozen and ten lots were specified for delivery October 1, 1952, at $.5320 a dozen.

All of the lots of eggs offered for delivery under contract A1PM(MF) 2727 on September 2d and a substantial portion of those offered for delivery October 1st failed to meet the quality requirements specified in PY-61 and were rejected. Upon requests of the plaintiff for extensions of time on deliveries, the PMA granted extensions, which were accepted by the plaintiff, for the September 2d to September 12th deliveries, at one-fifth of a cent a dozen a day, two-fifths of a cent for deliveries from September 13th to 17th, inclusive, and four-fifths of a cent a dozen a day from September 18th to 22d. A similar penalty of one-fifth of a cent a dozen a day was imposed for delays in deliveries due October 1 to 12, 1952. The plaintiff continued in default on some lots and was finally granted extensions for both delivery dates to November 7, 1952, at a flat two cents a dozen for all lots on which deliveries were late ten days or more.

9. On June 21, 1952, plaintiff submitted a bid, which was accepted by by PMA on June 26, 1952, for 24 lots (12,000

cases) of eggs at an approved warehouse in Burlington, Iowa, of which eight lots were specified for delivery September 2, 1952, at $.5249 a dozen, eight lots for delivery October 1, 1952, at $.5349 a dozen, and eight lots for delivery November 1, 1952, at $.5449 a dozen, all under contract designated as A1PM(MF)2738.

Upon request of the plaintiff, the PMA granted an extension of ten days for deliveries due September 2d and October 1st, at a penalty of one-fifth of a cent a dozen a day, which was accepted by the plaintiff. One lot which was due for delivery September 2d was delayed seven days, two lots due for delivery October 1st were delayed two days, and one other lot eight days. There were no delays in the November 1st deliveries at Burlington, Iowa.

10. In addition to the 54 lots of eggs sold by the plaintiff in its own name, the plaintiff also sold 64 lots of eggs through Sol Rich & Company, acting as plaintiff's broker. During 1952, Sol Rich & Company was regularly engaged as a broker in connection with the sale of eggs and other commodities for others. At the request of the plaintiff, Sol Rich & Company, sometimes referred to as Rich, submitted bids in its own name pursuant to announcement PY–61 on behalf of the plaintiff and a number of other dealers throughout the country, in accordance with custom in the trade.

Plaintiff informed the defendant by wire on September 14, 1952, that its eggs were sold under Rich contracts A1PM (MF) Nos. 2691, 2695, and 2732, and requested an extension of time without penalty for the undelivered lots that were past due at that time. The defendant was also informed by Rich on August 19, 1952, that a portion of the eggs sold under contract 2695 were for the Nebraska Egg & Poultry Company. All other correspondence relating to these contracts was carried on with the defendant and Sol Rich & Company. The Rich contracts involving the 64 additional lots of plaintiff's eggs are described in the following findings.

11. On May 10, 1952, Rich submitted a bid for the delivery of eight lots of eggs pursuant to PY–61, with deliveries at Chicago, Los Angeles, San Francisco, Dallas, St. Louis, and Memphis. The contracting officer for PMA accepted only four lots, all of which represented plaintiff's eggs, for delivery September 2, 1952. By letter of May 15, 1952, Rich was

notified of this award under contract 2691. Two lots (1,000 cases) were designated for delivery at St. Louis, Missouri, at $.5224 a dozen, and two lots (1,000 cases) for delivery at Memphis at $.5274 a dozen.

By letter of May 22, 1952, Rich notified plaintiff that these lots were sold for plaintiff's account.

12. On May 17, 1952, Rich submitted a bid for the delivery of 42 lots of eggs under PY–61 at various points throughout the country. On May 21, 1952, this offer was accepted in full by the PMA as contract 2695. It included 20 lots (10,000 cases) of eggs owned by Nichols & Company, of which five lots were to be delivered at an approved warehouse in St. Louis September 2, 1952, at $.5224 a dozen, five lots for delivery in St. Louis October 1, 1952, at $.5324 a dozen, five lots for delivery in Memphis September 2, 1952, at $.5274 a dozen, and five lots for delivery in Memphis October 1, 1952, at $.5374 a dozen.

On May 22, 1952, Rich notified Nichols & Company that the 20 lots of eggs were sold for its account under PY–61 and also advised of the prices specified in contract 2695.

13. On June 14, 1952, Rich submitted a bid under PY–61 for the delivery of 46 lots of eggs, including 40 lots for delivery at Peoria, Illinois, two lots at Lincoln, two lots at York, Nebraska, and two lots at Duluth, Minnesota. This offer was accepted by PMA on June 19, 1952, under contract 2732. The 40 lots (19,200 cases) of eggs specified for delivery at an approved warehouse in Peoria, Illinois, were sold for Nichols & Company, with 20 lots to be delivered September 2, 1952, at $.5224 a dozen and 20 lots to be delivered October 1, 1952, at $.5324 a dozen.

By letter of June 20, 1952, Rich notified Nichols that these eggs were sold for its account.

14. The plaintiff ascertained that the approved warehouse in St. Louis where it was contemplated that the September 2, 1952, deliveries under the Rich contracts 2691 and 2695 would be made, was filled with Government surplus commodities and that the warehouse could not accept the eggs for storage. On August 14, 1952, Rich requested a change of the delivery point for the seven lots (3,500 cases) of eggs for delivery September 2, 1952, from St. Louis to Peoria, Illinois, with an allowance of freight to St. Louis. The contracts

(2691 and 2695) were amended by the contracting officer, Roy D. Flato, and Rich was notified of the amendment on August 22, 1952, providing for a change in place of delivery of the September 2 shipment from St. Louis to Peoria, at a reduction of $.025 per dozen. The change in delivery point to Peoria with reduction in price fixed by the contracting officer was accepted by Rich August 25, 1952.

**15.** Thirty-six of the 37 lots of eggs offered under the contracts of Sol Rich & Company for delivery at Peoria September 2, 1952, failed to meet the quality requirements specified in PY-61 and were rejected. The additional work of recandling, and replacing a large portion, of the eggs in each lot delayed the deliveries beyond the specified delivery dates. Upon requests of Rich, the PMA extended the prospective September 2 deliveries for a period of ten days at a reduction of one-fifth of a cent a dozen a day and two-fifths of a cent a dozen for deliveries after September 12.

On September 17, 1952, Rich wrote the contracting officer that it would be in default on the September deliveries of two lots under contract 2691, five lots under contract 2695, and three lots under contract 2732. These ten lots were accordingly terminated by the contracting officer September 18, 1952. However, by letter of October 24, 1952, the contracting officer withdrew the termination of these lots and extended the time for all delinquent deliveries until November 7, with a net reduction of two cents a dozen on all deliveries that were delayed for ten days or more. One lot under contract 2695 was extended for delivery until November 12, 1952, at the flat reduction of two cents a dozen. Thus, as in the contracts with Nichols & Company, the maximum reduction for delayed deliveries of ten days or more was limited to two cents a dozen on all of the Rich contracts.

**16.** The plaintiff's contracts 2727 and 2738 called for the delivery of 54 lots of 27,000 (30 dozen cases) and the Rich contracts 2691, 2695, and 2732 called for the delivery of 64 lots of 31,200 30-dozen cases. The plaintiff actually delivered 118 lots of 57,040 30-dozen cases under all of these contracts, because most of the lots delivered at Peoria, Illinois, and Burlington, Iowa, consisted of 480 30-dozen cases. The plaintiff performed all of the contracts in full, insofar as

they pertained to the plaintiff's eggs, and made final delivery on or about November 12, 1952.

The following summary contains the contract price, contract adjustments, and the net payments under each group of contracts in accordance with the delivery points required:

| Delivery points | | Nichols contract Nos. 2727 and 2738 | Rich contract Nos. 2691, 2695, and 2732 |
|---|---|---|---|
| *Peoria* | | | |
| Number of lots and cases | | 36 (14,465) | 47 (22,580) |
| Contract prices | | $229,263.75 | $356,440.32 |
| Deductions: | | | |
| Transfers from St. Louis delivery | | | 2,520.00 |
| Penalty for delays in deliveries | | 7,555.80 | 6,657.80 |
| Net payments received | | $221,707.95 | $347,262.52 |
| *Burlington* | | | |
| Number of lots and cases | | 24 (11,520) | |
| Contract price | | $184,861.44 | |
| Deductions: | | | |
| Penalties for delays | | 547.20 | |
| Net payments received | | $184,314.24 | |
| *St. Louis* | | | |
| Number of lots and cases | | | 5 (2,495) |
| Contract price | | | $39,850.13 |
| Deductions: | | | |
| Penalties for delays | | | 172.80 |
| Net payments received | | | $39,677.33 |
| *Memphis* | | | |
| Number of lots and cases | | | 12 (6,000) |
| Contract price | | | $95,682.00 |
| Deductions: | | | |
| Penalties for delays | | | 45.00 |
| Net payments received | | | $95,637.00 |
| *Combined* | | | |
| Contract prices | $906,097.64 | $414,125.19 | $491,972.45 |
| Less—deductions | 17,498.60 | 8,103.00 | 9,395.60 |
| Net payments | $888,599.04 | $406,022.19 | [1] $482,576.85 |

[1] The above computations under these contracts are reported in lieu of plaintiff's figures which do not represent actual contract delivery requirements, with the tolerance of 5 percent differentials in the number of cases in each lot. The figures are separated between plaintiff's contracts and Rich's contracts, since defendant contended at the trial that Nichols is not the proper party plaintiff in the Rich contracts. It also shows actual contract prices, penalties, and net amounts paid. Plaintiff claims recovery of the penalties in its Count I. Rich's penalties (other than the transfer deduction of 2½ cents a dozen for delays) is $7,075.60, or 46.62 percent of the delay penalties.

17. Plaintiff claims breach of the contracts involved in this action, particularly at Peoria, Illinois, by inspectors Thomas S. McCurley and Robert L. Young, who performed most of

the inspection of eggs offered for delivery at Peoria. Plaintiff contends there was bias and unfair grading of its eggs, improper selection of samples for grading, refusal by defendant to perform regrading of rejected lots when requested to do so, excessive and rough handling of eggs, and the use of a candling light with excessively intensive light power which resulted in reporting of excessive defects in the eggs examined and improper classification of the eggs, all of which plaintiff alleges were contrary to the contract specifications and administrative regulations for the inspection and grading of shell eggs.

18. Regulations were issued from time to time by PMA for the grading, labeling, and classification of shell eggs and poultry products. The regulations governing the inspection and grading of shell eggs during the delivery periods of the contracts herein were consolidated and issued in July 1952 as the Shell Egg Graders Handbook, a copy of which was placed in evidence as plaintiff Exhibit No. 6.

Shell eggs were classified into approximately 15 U.S. Grades, as U.S. Grade AA (Consumer), U.S. Specials, U.S. Grade A, Procurement I, Procurement II, Procurement III, Procurement IV, U.S. Extras, U.S. Grade B (Consumer), U.S. Standards, U.S. Grade C (Consumer), U.S. Stained, U.S. Trades, U.S. Dirties, and U.S. Checks. When any lot contained more than 5 percent "loss," it was certified as "No U.S. Grade." The specifications in PY–61 for weight, grade, and loss allowances came under Procurement II grade. The tolerance for individual cases inspected was 10 percent less than the lot average requirement.

The term "stained" was to be employed where the soiled portion was not more than one-eighth of the shell area; "dirties," where more than one-eighth of the shell area was soiled; "checks," if the shell was cracked but the membrane was not broken; and "leakers," if membrane was broken to the extent that it permits leakage of the egg. Except on a request of an applicant it was not required that "stained" eggs be graded as to interior quality, other than for loss and checks.

19. The regulations permitted a wide latitude for the discretion and judgment of the grader, and the proper grading

of the shell eggs depended largely upon the training and experience of the grader. However, certain provisions, tolerances, and allowances were specified and required in the inspection and grading of shell eggs.

The Shell Egg Graders Handbook, which was regularly employed by graders, provides, in part, as follows:

> I. REQUIRED FACILITIES
>
> * * * * *
>
> B. Candling light
>
> 1. There are many different styles and types of candling lights commercially available in which the light intensity and the size of the candler opening vary considerably. Most of these candling lights, however, are satisfactory, if they are adjusted to provide comfort and proper illumination for the job. It is merely a matter of becoming accustomed to the type of light in use. Accuracy of the candling results can be checked by breaking out a few eggs and checking the broken out quality with the candled results.

The regulations providing standards for quality of individual shell eggs include, *inter alia*, the following:

> § 42.1 *Application.* * * *
>
> Interior egg quality specifications for these standards are based on the use of a candling light delivering approximately 350 to 450 foot-candles of light at the candling opening. The usual box type of candling light, without reflector, using a clean 40-watt frosted bulb about 1-½ inches from and in direct line (direct light) behind the opening which should be approximately 1-⅛ inches in diameter, or a clean 60-watt frosted bulb immediately above and 1-½ inches behind the opening (indirect light) provides approximately 310 foot-candles of light at the opening. A 60-watt bulb in a direct light candler, or a 75-watt bulb in an indirect light candler, provides approximately 380 foot-candles of light at the opening. Reference to "usual box type of candling light" should not be construed as restricting use to that type only. Any type or make of candling light may be used so long as the resulting foot-candles of light are the same.

The Shell Egg Graders Handbook provides at paragraph V, "THE DRAWING OF SAMPLE," in part as follows:

> A. Graders are to personally draw all samples, including, if possible, samples from lots in a public ware-

house. When sample is drawn by a public warehouse employee, the covering certificate shall be qualified with the words typed in all capital letters WAREHOUSE SAMPLE.

B. * * * Draw the samples proportionately from various parts of the lot.

* * * * *

G. *Regrading—Appeal Grading.*

Whenever an applicant questions the correctness of the original grade and size, a regrading may be made by re-examining the original sample and in addition draw a duplicate size sample at random. The final grade shall be the average of the original sample (second grading) and the duplicate sample. The fee for such grading shall be based on time. The date on the certificate shall be the date of the final grading. Such a regrade may be made only after the original certificate is surrendered.

An applicant may also file a request for an appeal grading. Whenever such an appeal is allowed, the grading procedure shall be the same as for a regrading.

An appeal grading could be made by any interested party who was dissatisfied with the grading certificate within 2 days after it was issued, orally or in writing, whereas a request for regrading could be made at any time by such interested party. The pertinent provisions of the regulations dealing with appeal grading are set out in 7 C.F.R., Part 55, as follows:

§ 55.22 *When appeal grading may be requested.* An application for an appeal grading may be made by any interested party who is dissatisfied with any determination stated in any grading certificate; if the identity of the samples, or the product, has not been lost; and such application for an appeal grading shall be made within two days following the day on which the grading was performed. Upon approval by the Administrator, the time within which an application for an appeal grading may be made may be extended.

§ 55.23 *How to obtain appeal grading.* Appeal grading may be obtained by filing a request therefor (a) with the Administrator, (b) with the grader or inspector who issued the grading certificate with respect to which the appeal grading is requested, (c) with the immediate superior of such grader or inspector, or (d) with the officer in charge of any office of grading. The application for appeal grading shall state the reasons therefor

and may be accompanied by a copy of the aforesaid grading certificate or any other information the applicant may have secured regarding the product, at the time of grading, from which the appeal is requested. Such application may be made orally (in person or by telephone), in writing, or by telegraph. If made orally, written confirmation may be required.

* * * * * *

§ 55.28 *Who shall make appeal gradings.* An appeal grading of any graded product shall be made by any grader (other than the one from whose grading the appeal is made) designated for this purpose by the Administrator; and, whenever practical, such appeal grading shall be conducted jointly by two such graders.

**20.** The number of samples inspected for the purpose of grading a lot depended upon the size of the lot offered. In carlots of 401 to 600 cases, the minimum samples required to be inspected were 15 cases of 30 dozen each. But, if in doubt, or if the quality of a lot was irregular and the grade not clearly defined; it was necessary to examine as many as 30 or more cases.

The grading of samples required the examination of 100 eggs in each case of 360 eggs, and the average grade for the lot was based upon the number of sample cases multiplied by 100. Thus, a minimum of 1,500 eggs were inspected for the determination of the average grades of each lot of 500 cases of 180,000 eggs, representing less than 1 percent (.83 percent) of the lot graded. Further, the "loss" allowance of .3 percent under PY–01 permitted a maximum of four or five eggs, of combined dirties, leakers, and other eggs constituting "loss" out of the total of 1,500 eggs inspected.

The quality of a lot was determined upon the basis of the total number of samples selected. It was an applicant's privilege to rework the lot, by removing the eggs candled by certain candlers, by individual case inspection, by recandling, or by eliminating portions of the lot. But, when the character of the lot was changed in this manner, it was required that new samples be selected and the grades certified as a new lot. The original certificate was never to be destroyed.

**21.** The method of grading required that the 100 eggs inspected in the first sample case be taken from the top three

fillers of 36 eggs each on one end of the case, except eight eggs in the lower filler. The second sample case required the examination of the second, third, and fourth fillers; the third sample required the examination of the third, fourth, and fifth fillers; the fourth sample required the examination of the first, second, and fifth fillers; and the fifth sample required the examination of the first, fourth, and fifth fillers, all from one end of the case and excluding eight eggs in the lower filler in each instance. The same procedure was to be followed in the examination of samples in excess of five for the same lot.

The eight eggs in the lower filler of each case examined were to be left in the same corner in each case in order to avoid any argument as to whether any of the eight eggs left in the third filler were to be included or excluded in grading the case.

The 100 eggs examined in each case were then to be replaced on the top fillers of one end of the case, and that end was to be stamped twice to identify the end examined. The entire lot was then identified by the official grade stamp.

22. In the grading process each half case graded was to be examined for the presence of any undesirable odors, and, if found, the lot was placed in a "No U.S. Grade" classification. All eggs appearing dirty when the filler was removed were to be candled first.

A memorandum, sometimes referred to as a work sheet, was required for the recording of all details upon which a grade was determined. In connection with its preparation, the Shell Egg graders Handbook states, in part, as follows:

> XI. PREPARATION OF MEMORANDUM
>
> A. Execute the official egg grader's memorandum in detail at the time of grading. All grading certificates shall be "backed-up" with a detailed memorandum which shall be kept on file. Sign the memorandum in ink or indelible pencil.
>
> B. The detail required on the memorandum includes all information that is typed on the certificate and in addition such comments as to loading, holding, and general character of the eggs as may be useful, should there be a dispute as to the accuracy of the grade at a later date.

The final grading was prepared in certificate form, showing the classification of each case sample, and the average grade of all samples, which became the grade of the lot. The number of copies of certificates depended upon the request of the applicant for whom the original, and as many copies as desired, were to be furnished. One copy with the official memorandum attached was to be forwarded each Saturday to the State Supervisor's office. One copy was attached to the monthly report to the State Supervisor's office, and an extra copy was prepared when the applicant was a Federal agency.

Upon request of an applicant, advance information could be furnished in respect to all or part of any grading certificate issued to him or to any person designated by him.

**23.** Prior to the dates that bids were submitted for the delivery of eggs under PY–61 by Nichols and Rich, the plaintiff had in storage 89 lots of eggs in approved warehouses in Peoria, Illinois, and 28 lots of eggs in Burlington, Iowa. All of these eggs had been inspected and graded and certificates were issued at the time they were placed in storage. Certificates covering 59 lots of eggs in warehouses in Peoria were introduced in evidence. Most of these lots of eggs were graded as "extra large," and, with the exception of one lot which was graded 68.9 percent, each lot was graded 70 percent or better of "A" quality. However, the "loss" classification in excess of .3 percent and up to a maximum of .8 percent appeared in the certificates for 27 lots at Peoria and four lots at Burlington, with additional loss by reason of dirties and leakers in excess of .3 percent in four lots at Peoria and five lots at Burlington. Thus there were 40 of the 59 lots for which certificates had been issued when the eggs were placed in storage containing "loss" in excess of the .3 percent specified under PY–61.

**24.** Prior to the time for the first offering of eggs under the contracts, and commencing about the end of July 1952, plaintiff had portions of each lot removed from the warehouses and recandled. Undesirable eggs were removed and replaced before returning them to storage and before they were offered for final inspection. Those stored at Peoria, Illinois, were hauled to plaintiff's plant at Avon in refrigerator trucks, a distance of approximately 55 miles,

where the recandling was performed by plaintiff's employees. Approximately 3,000 cases of eggs out of about 40,000 cases were reworked in this manner. From five cases to approximately 150 cases in each lot were reworked in order to improve the grade average so that the lot would meet the contract requirements. All cases of eggs that were recandled and inspected were marked for identification with a small strip of scotch tape.

25. Prior to the inspection of any of the eggs tendered for delivery, Thomas McCurley told Mr. Nichols that he was of the opinion that storage eggs could not meet the requirements of PY–61 without complete reworking. This opinion was shared by at least three other officials of the USDA, all of whom so testified at the trial of this case.

At about this same time McCurley also told Nichols that he was considering going into the retail poultry and egg business in Springfield, and asked Mr. Nichols, in case he decided to do so, if he would furnish him poultry and eggs on credit, but Mr. Nichols told him that he conducted his business on a cash basis and could not do so.

26. By letter dated August 20, 1952, to Thomas McCurley, the plaintiff submitted for inspection at Peoria 20 lots of eggs on its contract 2727 and twenty lots on the Rich contract 2732. These lots were offered for delivery to PMA on September 2, 1952, together with seven lots under Rich contracts 2691 and 2695 on which deliveries were transferred from St. Louis to Peoria. When plaintiff offered eggs under the Rich contracts, McCurley made inquiry as to plaintiff's interest in the Rich contracts, and was informed by M. L. Nichols, Sr., president of the plaintiff corporation, that it was under a financial arrangement, but he did not advise McCurley that Rich was his broker.

Of the 47 lots tendered at Peoria for delivery September 2, 1952, only 11 lots were accepted under Rich contract 2732 and all other lots were rejected for failure to meet the requirements of PY–61. Thereafter the plaintiff was required to rework substantially all eggs offered under PY–61, as hereinafter reported.

Of the 30 lots tendered at Peoria for delivery October 1, 1952, on contracts 2727 and 2732, only ten lots were accepted

without penalty. The plaintiff offered and paid for inspection of 165 lots of eggs at Peoria before the acceptance of 77 lots under contracts involved herein.

Approximately 111 lots of eggs were reworked completely one or more times.

**27.** On August 20, 1952, plaintiff submitted for inspection eight lots of eggs at Burlington, Iowa. Seven of these lots met the requirements for weight and quality of PY-61 and were delivered under contract 2738 on September 2d, and one lot was reworked and accepted on September 9, 1952. Eight additional lots were offered for inspection September 19, 1952, of which five lots were accepted for delivery October 1st. Of the three lots rejected, two lots were reworked and accepted October 3d and one lot was accepted October 9, 1952. All eight lots offered for inspection and delivery November 1, 1952, were accepted on contract 2738.

**28.** Plaintiff had no eggs in storage at Memphis but transferred nine lots from Peoria and three lots from Burlington to an approved warehouse there for delivery under Rich contracts 2691 and 2695. The inspection certificates issued at the time these lots were placed in storage show "loss" in excess of .3 percent on seven of these lots. They were partially reworked before they were offered for delivery. None of these lots was rejected. Seven lots were accepted for delivery September 1st, and five lots on October 1, 1952.

The plaintiff offered five lots of eggs at St. Louis for delivery October 1, 1952, under Rich contract 2695, of which one lot was rejected and replaced.

**29.** Pursuant to plaintiff's request for the inspection of eggs it proposed to deliver under the contracts herein, inspectors Thomas S. McCurley and Robert L. Young commenced inspection of these eggs at the Peoria warehouse about August 25, 1952. The first few lots were found of very high quality; it was found that some of the sample cases were marked with a strip of scotch tape, indicating that they had been reworked. It is established that when warehouse employees select the samples for an inspector they are likely to take them from the most accessible places and also replace the reworked eggs in the most accessible portion of the lot from which the samples for a final inspection would normally be taken. In one instance five addi-

tional sample cases were drawn by inspector McCurley, whereby an excess loss was established for the lot and four additional lots were rejected by amendments.

The inspectors at Peoria stated that the samples inspected during the first two days were drawn by warehouse employees, but the certificates issued for these first lots do not indicate who drew the samples, as required by the regulations. In Burlington, Iowa, where warehouse employees drew samples during the first few days, it is so indicated on the certificates issued. Except for the first two days of inspection, all samples at Peoria were selected and designated by the inspectors.

Inspectors McCurley and Young graded most of the eggs offered by plaintiff at Peoria, but they were later assisted by inspector James S. Crosson, and, during the first week, William H. Dingman assisted in the inspection and signed certificates for 17 lots, of which 14 lots failed to meet the requirements of PY-61. By August 30, 1952, samples from 49 lots had been inspected and 38 of these lots failed to meet requirements.

The plaintiff had no representative at Peoria where the inspection was being performed until late August or the first of September 1952, when Mr. Harold Altheide, the plant manager, arrived at Peoria to take over the rejected lots of eggs and offer other eggs on the contract. The rejected lots of eggs were reworked as rapidly as possible at Avon and Bushnell, Illinois, so that they could be offered as new lots and reduce the delay in making deliveries. When most of the reworked eggs were again rejected Altheide declined to offer other eggs, and on September 26th requested Nichols to relieve him of duty at Peoria. Mr. Merlin Nichols, Jr., came to Peoria about October 1, 1952, and supervised the reworking of eggs and offers of eggs under the contracts until completion.

30. Small cold storage warehouses do not normally provide space for reworking stored eggs, but furnish only one small room for the inspectors. During the period from September 1 to 12, 1952, the plaintiff hauled some 27 complete lots to Avon and Bushnell, Illinois, for reworking. The plaintiff had employed additional graders and maintained approximately 20 to 24 graders in reworking eggs

rejected at Peoria. Because of the urgency to make early delivery, and reduce the penalty for delays, the plaintiff reworked 23 lots entirely, and returned four of the lots and redistributed them with four other lots.

During the period from September 4, when inspection was resumed, until September 15, 1952, the inspectors examined 24 additional lots, most of which had been reworked completely. Only 7 lots of these met contract requirements and 17 lots were rejected.

Inspections were made and certificates issued on eight lots the same day they were returned to the warehouse, three other lots on the first day in storage, four on the second day, two on the third day, five on the fourth day, and two on the fifth day. The lots that were reworked at Avon and Bushnell were not usually stored in the warehouse cooler until after inspection to determine whether or not they would be accepted.

It was the duty of warehousemen to store all perishables as soon as received. Because of the procedure of inspecting these lots before placing them in storage, some of the eggs remained on the loading docks for several hours and the weather was very warm; the average temperatures for the month of August being from 62.2° F. low to 83° high, and for September a minimum of 52.7° and a maximum of 78.7°.

Some of the samples were returned to the warehouse the same day they were inspected. Samples marked for inspection would be placed on dollies or platforms and shifted from place to place in congested areas until they could be inspected. This was necessary because they could not be returned to the warehouse until they had been inspected and accepted.

The stenciling of all cases in a lot which was approved for delivery on PY–61 contracts was omitted in the early lots until they were loaded out in order to avoid excessive handling. However, McCurley required that all of these lots be stenciled before a certificate of inspection would be issued, and that all lots offered under PY–61 contracts thereafter be marked and stenciled before inspection, which resulted in additional handling.

Certificates of inspection were normally issued the same day that eggs were graded, and the applicant, plaintiff in this case, would normally have received the same within two or

three days, except for some delay in stenciling the early lots inspected.

Thereafter, arrangements were made whereby all of the eggs remaining for delivery were reworked in the hallways of the warehouse. Regular inspection was again resumed about September 23, 1952, and continued until about November 8, 1952. All of the eggs offered during this period were reworked in the Peoria warehouse and 52 lots were accepted out of 82 lots inspected.

31. No regular inspection was performed at Peoria between August 30 and September 4, 1952, after only 11 lots were accepted out of 47 due for delivery on September 2, 1952. Nichols offered other lots, which he had on storage in Peoria for intended delivery October 1st, but McCurley stated it was useless to inspect any additional lots for delivery under the lunch program of PY-61 until they had been completely reworked. Dolson stated that his instructions to McCurley were to continue to grade lots offered, and that the reworking of a lot of eggs was not a condition to complying with a request for inspection. However, it was McCurley's opinion and he so advised Nichols, that eggs which were inspected in the spring when stored, having a loss factor of .3 up to .7 percent, could not be expected to pass inspection for acceptance under PY-61 with a maximum loss allowance of .3 percent because of some deterioration which would occur while in storage and from handling.

No regular inspection was performed at Peoria from September 15th, when the reworking of eggs was discontinued at Avon and Bushnell, and September 23, 1952, when plaintiff established graders to rework eggs in the Peoria warehouse.

32. About two days after inspection of eggs was commenced in Peoria on August 25, 1952, Lawrence J. Dolson, the Chicago area supervisor, was informed by McCurley that Nichols had protested the rejections being made by the inspectors and had requested reinspections of the same lots. Dolson advised McCurley that regrading was not permitted unless the lot had been reworked, or the character had been materially changed, so as to constitute a new lot of eggs. The plaintiff made repeated requests for the regrading of lots previously rejected, but requested that the regrading be performed by inspectors other than McCurley or Young.

In one instance McCurley had assembled a group of "loss" eggs that caused the rejection of the lot, and Mr. Altheide requested that the eggs be broken out of the shell to determine the condition of the contents. They were broken in the presence of three inspectors and every egg in the group was found satisfactory and the grading was amended for acceptance of the lot.

Plaintiff made no request for appeal grading.

33. As stated, a Mr. Dolson was the supervisor for the Chicago area, consisting of 12 States, including Illinois, but plaintiff, from the beginning, lodged his protests against what it considered unfair grading of its eggs with the PMA officials in Washington.

On September 14, 1952, plaintiff wired Messrs. Termohlen, Flato, Kemper and Cunningham, in part, as follows:

> We further request extension of time for delivery without penalty after September 12th because we believe Agency thru its agent and inspector in charge failed to have made inspections without prejudice. We further believe we could have made by this writing full delivery of all lots sold had we had inspection without prejudice in the normal course of business. We believe we have had much unnecessary and abnormal expense and costs in regrading of eggs which might have otherwise been acceptable had inspector in charge not been prejudiced. We believe the inspector to be of high integrity and sincere in his work but that he was at all times abritrary in his decisions regarding this particular contract and made the decisions as to the outcome of the grading prior to making inspections. Inspector informed us that eggs would not meet requirements of contract prior to grading, during original grading, during regrading and has informed us as of Sept. 13th that it would be impossible to pass further inspections because he had checked lots previously inspected and found same to contain more loss than when originally inspected. That inspector in charge further informed us that agency should not have made contract which in his opinion was and is impossible to fill with storage eggs and also informed us we should not have sold eggs under a contract which in his opinion was impossible to fill. Inspector further informed us several times that he was not taking any responsibilities which might endanger his job and future and also that PMA should have taken steps to have this particular contract inspected by other inspectors. All we ask is that the agency allow us to fulfill this contract in the

best possible time and manner under continuous supervision and inspection by inspectors appointed by Mr. Kempers who can make inspections without fear of personal harm and without prejudice to our fulfillment of our contract and obligation. Since Messrs. Termohlen, Miller, Flato, Cunningham and Kempers have promised us their wholehearted support and cooperation and that the agency has no intent of jeopardizing or causing the failure of our business and of putting our employees out of a job we hope the agency will give serious consideration to our request as outlined to Mr. Cunningham that beginning at once we be allowed to fulfill September contracts under continuous supervision and inspection while regrading the balance of contract by inspectors designated by Mr. Kempers either at Peoria or our plants without any additional penalties of time after September 12th as we could not financially absorb same.

* * * * *

34. Upon the direction of Bernard W. Kempers, the Assistant Supervisor for the Chicago area, Dale H. Shearer, went to Peoria to receive and investigate Nichols' complaints. He rechecked a number of the lots that had been rejected and found the samples substantially the same as they had been graded by the inspectors.

While in Peoria, Mr. Shearer explained to both Mr. Nichols and Mr. Altheide the reasons that the eggs were not meeting requirements, and reported that he received no specific complaint on any specific lots while he was there. The only specific complaint that he could recall was the first telephone call by Nichols to his office that the men were following the book too closely. Mr. Nichols did not complain to Mr. Shearer of any unfair grading.

Prior to the installation of reworking operations in the Peoria warehouse, Mr. Shearer made personal inspections of two lots bearing new lot numbers and which obviously had been reworked at Avon or Bushnell. One certificate was issued by him on September 9, 1952, and met the requirements of PY–61. The other certificate issued September 16, 1952, failed to meet such requirements. On a later visit, on September 22 and 23, Mr. Shearer inspected five of the original lots, originally stored in the Peoria warehouse in February 1952, all of which had been reworked, and all these met contract requirements.

On October 10, 1952, Mr. Shearer reported to Bernard W. Kempers that the gradings by McCurley, Young, and Crosson were correct.

35. The plaintiff contends that one major reason for the downgrading of its eggs was the type of candling light employed by the inspectors. This type is known as the "BB" candler, containing a 60-watt clear bulb, with a reflector that would deliver a light estimated in excess of 4,000 foot-candles at three inches from the aperture. The "BB" candler had an aperture approximately $^{13}/_{16}$th of an inch, with a rubber bumper, or gasket around the edge. Without the reflector the light intensity would measure about 300 foot-candles, and with adjustments of the reflector it would vary from 300 to in excess of 4,000 foot-candles. With the greater light intensity, certain defects in an egg became more pronounced and a wider range of flaws could be observed. It permits faster observation of the egg content and a more rapid inspection operation.

The "BB" candler has been used uniformly by the USDA inspection service since 1952. However, this was the first use of the "BB" candler in plaintiff's experience. There is no evidence that any of the graders at Peoria had any prior experience in the use of the "BB" candler, except William H. Dingman, who used it in some field work in Korea in 1950.

The merits of the "BB" candler are established by its adoption and use as the standard type in all major warehouses. The downgrading of plaintiff's eggs, if any, which resulted from the use of the "BB" candler, is not determinable from the evidence presented.

36. The plaintiff had a number of conferences with PMA officials in connection with the grading and reworking of eggs and to arrange extensions of time for deliveries. At conferences in Washington on September 12 and 15, 1952, Nichols submitted his complaints of unfair grading and requested an investigation. The matter was discussed with Messrs. Kempers, Termohlen, Miller, Flato, and Cunningham.

Mr. Miller stated that it was not contemplated that eggs offered under PY-61 would be reworked, but that the bid price should have provided for necessary reworking to meet the quality and loss requirements and that most of the eggs offered were reworked. Both Mr. Kemper and Mr. Ter-

mohlen were of the opinion that plaintiff should have known that storage eggs would have required reworking to meet the requirements of PY–61. These officials offered to cooperate and did assist in the arrangement for the reworking of eggs in the Peoria warehouse, in order that plaintiff might avoid hauling them to Avon and Bushnell and the excessive handling.

A report of deliveries under PY–61 in Nebraska was made by the state supervisor, pointing out that, of 116 original lots offered, 50 lots had not been reworked and 28 of them were accepted and 22 were rejected; 66 lots had been reworked, and, of these, 54 lots were accepted and 12 rejected. A total of 118 lots were finally accepted in Nebraska by replacement of certain lots and the reworking of other lots. There is no evidence to show to what extent the original lots were reworked. Some of the lots offered had never been inspected when they were placed in storage. Sol Rich & Company was contractor for 46 of the lots delivered in Nebraska.

No documentary data relating to the experience of other contractors under PY–61 have been put in the record in this case.

37. On January 18, 1953, the plaintiff submitted a claim to the Comptroller General for $177,136.27, based upon unfair and improper grading of eggs delivered under PY–61, primarily at Peoria, Illinois. The claim as filed is a part of plaintiff's proof in the record of this suit.

By letter of June 29, 1953, True D. Morse, Under Secretary of Agriculture, submitted to the Comptroller General a memorandum by William D. Termohlen, dated May 28, 1953, together with copies of two investigative reports, and recommended that plaintiff's claim be denied in its entirety.

There is no evidence of record to show what action, if any, was taken by the Comptroller General's office with respect to plaintiff's claim.

38. The reason assigned for rejection of most of the eggs offered by plaintiff was a loss factor in excess of the .3 percent maximum allowance. Good eggs do not deteriorate very much while in storage, but poorer quality eggs continue to deteriorate. The hauling and repeated handling of the

eggs in the reworking procedures and inspections contributed to the deterioration and loss factor in plaintiff's eggs.

The eggs offered for delivery at Memphis were reworked only in part, and were all inspected at Avon, Illinois, for quality under PY–61 before they were transferred to Memphis. However upon final inspection at Memphis, nine out of the twelve lots contained checks or losses in excess of maximum allowances, but were accepted with a small penalty reduction in price because of the additional tolerances for transit damages permitted under Article II of PY–61, where the eggs had been inspected within 15 days prior to final inspection and delivery and were found to have been within the maximum tolerances.

The lots transferred to Memphis were first inspected at Avon by Harry J. Brown and upon delivery to the Memphis warehouse were inspected by W. A. Covington.

39. The plaintiff furnished 57,040 cases of eggs or approximately 11.4 percent of the 500,000 cases of authorized purchases under PY–61. Except for the comparison of grading and rejections at Peoria with certificates issued for plaintiff's deliveries at Burlington, St. Louis, and Memphis, there is no evidence that plaintiff attempted to obtain the certificates and compare grades on deliveries under PY–61 by other contractors.

In order to show irregularities and unfair downgrading of its eggs at Peoria, the plaintiff requested and received copies of certificates issued in the Chicago area for the spring and fall grading for the same lots of storage eggs during the years 1949 to 1952, inclusive. The plaintiff made a study and prepared analyses of the certificates for the same lots issued in the spring, when the eggs were stored, and in the fall, when the eggs were sold, as follows:

| | Lots on which spring and fall certificates were issued | Lots showing increase in absolute quality | Increase in variation allowances to fall owners | |
|---|---|---|---|---|
| | | | Number of lots | Value at 48¢ per dozen |
| 1949 | 23 | 3 | 11 | $280.00 |
| 1950 | 974 | 182 | 490 | 205.14 |
| 1951 | 144 | 41 | 104 | 352.31 |
| 1952 | 717 | 190 | 457 | 260.92 |

40. Under the rules of the Chicago Mercantile Exchange, penalties are imposed on a point basis by the reduction of a certain number of eggs in each lot measured by the graded percentage of quality below "par." The plaintiff's analyses for 1952 of certificates issued on the same lots of stored eggs in the spring and in the fall reflect a substantially greater penalty reduction in the spring certificates, when the eggs were first stored, with a corresponding penalty in the price received by the farmers and dealers who produced or acquired the eggs for storage. The fall certificates for the same lots show reductions in penalty eggs in 457 lots, an increase in 190 lots and no change in 144 lots. The net benefit to the fall owner, on the basis of 48 cents a dozen, amounted to $119,260.

The defendant declined to verify or dispute these analyses. Mr. William D. Termohlen could not account for any increase in the absolute quality of stored eggs, but pointed out that a greater tolerance allowance is made in fall grading. Mr. Hermon I. Miller testified that an increase in the graded quality in the fall could be brought about by variations in the lots graded, since "warehouse samples" are normally used for fall inspections, and storage lots are generally accumulated from current receipts constituting small lots from different sources from which samples might be taken.

On cross-examination Termohlen and Miller testified that so many variations between gradings made in the spring and those accomplished in the fall could not be attributed to human error.

41. The regulations for United States Standards, Grades, and Weight Classes for Shell Eggs, covering wholesale grades, issued July 1, 1952, provide the tolerances for loss in each 30-dozen case of eight eggs, or 2.2 percent in U.S. Extras, A quality; and ten eggs, or 2.8 percent, in U.S. Standards, B quality, with the following provision:

> § 42.51 * * * (b) * * * For the period beginning on August 15 of any year and extending through January 31 of the next year, the permitted tolerance for Loss with respect to "refrigerator eggs" is 12 eggs (3.3 percent) [for U.S. Extras, A quality]
>
> * * * * *

[2] The comparison of certificates issued in the spring and in the fall was made by plaintiff.

(d) * * * For the period beginning on August 15 of any year and extending through January 31 of the next year, the permitted tolerance for Loss with respect to "refrigerator eggs" is 15 eggs (4.2 percent) [for U.S. Standards, B quality] * * *

There is no explanation in the regulations, nor in the graders' handbook, for the increase of 50 percent "loss" tolerance allowance in fall grading. However, this increased loss tolerance applied to "wholesale grades" only, and did not apply to "consumer" or "procurement" egg grading.

*Count V*

42. During the period pertinent to claims herein, the plaintiff entered into various contracts and replacements thereof for grading and inspection services, all of which were executed on the printed forms provided by PMA. The agreements stipulated in the contracts were substantially the same. The contracts provided in part as follows:

IT IS AGREED THAT:

(a) PMA will provide an adequate number of graders to perform the grading service covered hereby;

(b) At the sole discretion of PMA the graders may be either a Federal or State employee or a licensed employee of the applicant;

(c) PMA shall not be responsible for damages accruing through any acts of commission or omission on the part of any grader;

(d) The provisions hereof shall continue in full force and effect from its effective date until suspended, withdrawn, or terminated, by (i) mutual consent of the applicant and PMA; (ii) written notice given by either party to the other to take effect on a specific date not less than 30 days from the date of the giving of such notice; (iii) one (1) day's written notice by PMA to the applicant, if the applicant fails to honor any invoice within thirty (30) days after date of invoice covering the cost of the grading service as herein provided; or (iv) termination of the services requested herein pursuant to the provisions in the following paragraph (e);

(e) The services to be rendered hereunder shall be terminated by PMA at any time PMA, acting pursuant to any applicable laws, rules, or regulations, debars the applicant from receiving any further benefits of the service, or the services hereunder may be suspended or

terminated at any time PMA concludes that the applicant has not conformed, or cannot conform hereto; * * *

The following contracts and replacement contracts were entered into between plaintiff and PMA, grouped in accordance with the type of service, and the plant where services would be performed:

| Application date | Date approved | Type grading or service | Plant location |
|---|---|---|---|
| 4/ 5/51 | 4/16/51 | Shell eggs | Bushnell. |
| 6/27/51 | 7/25/51 | Shell eggs | Bushnell. |
| 1/ 9/52 | 1/23/52 | Shell eggs | Bushnell. |
| 3/13/54 | 4/ 1/54 | Shell eggs | Bushnell. |
| 11/ 9/51 | 11/26/51 | Shell eggs | Avon. |
| 1/ 9/52 | 1/23/52 | Shell eggs | Avon. |
| 3/13/54 | 4/ 1/54 | Shell eggs | Avon. |
| 11/ 9/51 | 11/26/51 | Egg products | Bushnell. |
| 1/ 9/52 | 1/23/52 | Egg products | Bushnell. |
| 3/18/54 | 4/ 1/54 | Egg products | Bushnell. |
| 1/ 9/52 | 10/ 6/52 | Dressed poultry | Bushnell. |
| 3/13/54 | 4/ 1/54 | Dressed poultry | Bushnell. |

The plaintiff had four grading contracts which were in effect on April 1, 1954. Each of these contracts specified that graders provided by PMA might be Federal or State employees or licensed employees of the plaintiff, but at the sole discretion of PMA. Licensed employees were required to furnish a bond to PMA, but could engage in any other activities of the operator, including supervisory duties, whereas a grader who was a Federal employee was required to confine his activities to grading services and such closely-related activities as the PMA might approve, but could not in any instance assume the duties of management.

43. In addition to the several grading service contracts, a separate memorandum of agreement, dated April 1, 1954, was prepared, signed, and submitted to plaintiff by L. J. Dolson and Thomas S. McCurley, for PMA, and was signed by M. L. Nichols for the plaintiff. This agreement was as follows:

> In order to have a mutual agreement as to the conditions under which service is being furnished, we request your concurrence to the following items:
>
> 1. Mr. Schute will be the grader in charge and inspector of egg products in charge for all contracts in effect in your plants at Avon and Bushnell, Ill.
>
> 2. A bonded assistant will assist Mr. Schute at Bushnell.
>
> 3. Mr. Schute's headquarters will be Bushnell.

4. Mr. Schute's normal hours of duty will be from 7 a.m. to 12 noon and from 1 p.m. to 4 p.m. Monday thru Friday. We do not expect him to work overtime except on official work. His annual and sick leave will be in accordance with the cooperative agreement between the U.S. Department of Agriculture and the Ill. State Department of Agri.

5. All official travel of Mr. Schute is by direction of his supervisor. It is understood that he may travel between Bushnell and Avon as directed by you. Such travel will be charged to you at the regular Federal rate and is payable to the Treasurer of the United States upon presentation of a proper billing by the Grading Service.

6. You are to furnish both graders adequate facilities. These are (but not necessarily limited to):

a. metal locker with lock.
b. individual egg scale with test weight.
c. scale for weighing 15 dozen eggs.
d. B. & B. candling light—this is the only light to be used in making official gradings.
e. thermometer for taking individual egg temperatures.
f. a satisfactory darkened inspection room to grade shell eggs.

7. Mr. Schute may only take technical direction from his Departmental supervisors. If you question his decisions, gradings, or inspection, you may appeal these in accordance with the regulations of the Secretary of Agriculture part 55 and part 70, copies of which you have. Such appeals may be directed to Mr. McCurley, Mr. Dolson, or the Washington Office of the Grading Service.

8. In accordance with your request, Mr. Schute will make routine comments to the person in charge of the work assignment, however, major comments will be made to you or your Son.

9. When you begin grading at Avon, Mr. Schute will review the work of each candler with the thought of selecting a bonded assistant for that plant should the volume handled be such that you desire a bonded assistant for that plant.

44. The Federal Regulations governing licensed graders, inspectors, samplers, and supervisors of packaging eggs and egg products provide, in part, as follows:

§ 55.33 *Who may be licensed.* (a) Any person who is a Federal or State employee possessing proper quali-

fications as determined by an examination for competency and who is to perform service pursuant to this part may be licensed by the Secretary as a grader, inspector, sampler, or supervisor of packaging.

(b) Any prospective licensee other than a Federal or State employee possessing proper qualifications as determined by an examination for competency and who is to perform service pursuant to this part may be licensed by the Secretary as a grader, inspector, sampler, or supervisor of packaging. However, prior to the granting of the license he shall procure and deliver to the Administration a surety bond issued by such surety as may be approved by the Administrator, in the amount of $1,000 for the proper performance of the duties of such licensee under this part.

There is nothing in the Federal regulations which required or authorized a licensed employee of the Federal or State government performing the same or similar duties to supervise the grading or inspection service performed by a licensed employee of the operator. There is nothing in these regulations which precludes licensed "bonded" graders from performing such check-grading and from issuing certificates of inspection or grades in the same manner as an NACC grader.

However, as more fully reported in findings 45 through 47, beginning in 1952, PMA announced a policy which would require the gradual replacement of licensed plant employees with Federal or State civil service employees. In the execution of this policy at least one Federal or State licensed grader was to be placed in each plant in a supervisory capacity initially. The civil service grader was to make all final check gradings and all grading certificates were to be signed by him.

45. The utilization of licensed company employees originated and their use was expanded during World War II. For several years the PMA had considered a policy which would result in the gradual replacement of licensed plant-employed personnel with licensed Federal or State civil service employees. This plan would avoid any increase in the number of licensed company employees, and replace those in firms having more than one service contract with PMA. This policy was set out in Instruction No. 918 (PY)-4, issued by the Director of the Poultry Branch of

PMA on May 21, 1952, to all regional grading supervisors and Federal-State supervisors. It reads as follows:

EMPLOYMENT OF RESIDENT GRADERS WITH STATUS OF CIVIL SERVANTS

I. PURPOSE

This instruction is issued as a guide in carrying out established policies in the rendering of grading service with respect to poultry, eggs, and egg products through use of civil servant licenses on Federal or State Payroll.

II. PROCEDURE

A. At least one grader, who has the status of a civil servant (State or Federal) will be stationed in any one plant for each operating shift, regardless of the number of types of grading service requested, except that additional personnel may be stationed at a plant when the regional supervisor deems it necessary to properly carry out the department's responsibility. Alternate or assistant graders may be provided by licensing bonded employees. Final check gradings shall be made by the civil servant grader, and all certificates issued will be signed by him. However, bonded graders may perform final check grading, and issue and sign certificates in cases of emergency leave or sickness on the part of the civil servant employee.

B. The foregoing procedure will be followed as expeditiously as possible with due consideration to operating and administrative problems in connection with the recruitment and training of such individuals. As rapidly as such civil servant personnel becomes available, they shall replace bonded graders. Action should be taken immediately to effect this procedure in all cases where consumer grade labeling is being performed, and in plants where both inspection and grading services are in effect. In cases where product is identified only on the basis of institutional packs and where the services of sanitarians are required, the bonded grader and sanitarian shall be replaced as rapidly as possible.

C. Recognizing the personnel management problem where seasonal operations or small volume are involved, or where product is identified only on the basis of institutional packs, other than in eviscerating and drying plants, the continued employment of bonded graders will be considered on an individual plant basis. Prior to considering the continued use of bonded employees in seasonal or small plants, consideration shall be given to rendering service by a circuit grader or sanitarian.

D. Presently employed licensed bonded graders are an excellent source of supply for civil servant graders.

Graders secured from this source should be transferred to plants other than those where they are presently employed. However, with approval of the Chief of the Inspection and Grading Division, a civil servant grader may be stationed in the same plant where he has been employed under bond, provided his services as a bonded licensee have proven excellent in all respects.

46. On July 18, 1952, the PMA submitted a memorandum circular to all firms holding contracts for inspection and grading services, with a copy of Instruction No. 918, to clarify some misunderstandings and to explain the procedure in placing the policy in effect. It was explained that reasons for establishing this policy included (1) some objections on the part of the industry that licensed bonded company employees could not perform as unbiased a job as civil service employees; (2) complaints had been received from livestock sanitation officials, Public Health officials, and Food and Drug Administration officials who urged that the term "Government graded" by licensed graders other than Federal or State employees be discontinued; and (3) it would be in the public interest to proceed toward the elimination of the use of bonded graders on as practical a basis as possible as soon as feasible.

The memorandum further stated that it was the policy of PMA to gradually replace plant-employed personnel licensed by PMA initially where the volume of operation was such that a full-time Federal or State employee could be clearly justified, particularly where consumer grade labeling was being performed and both inspection and grading services were in effect, as would apply to ready-to-cook poultry; where grading is done only on the basis of institutional packs and where the volume was found to be such that one Government employee could satisfactorily handle supervision of both grading and sanitation, giving due consideration to plant operating problems. Thereafter it was planned to continue the policy of replacements in consumer grade labeling of shell eggs, institutional pack grading of shell eggs, dress poultry grading institutional packs, plant sanitarians, and liquid and frozen egg inspectors. This was to be accomplished with due consideration given to seasonal operations or small volume on an individual plant basis. It was also

stated that a very important consideration was to bring about this new policy with a minimum of inconvenience and with little or no additional cost to the industry.

47. The following comparison of graders for Illinois (other than Chicago), Indiana, and Iowa, plaintiff's competitive area, is listed for firms receiving PMA "contract" grading and inspection services under the respective state supervising offices indicated:

| Year | Month | Illinois, Springfield | | Indiana, Lafayette | | Iowa, Des Moines | | Total | |
|---|---|---|---|---|---|---|---|---|---|
| | | Bonded | NACC | Bonded | NACC | Bonded | NACC | Bonded | NACC |
| 1951 | Oct. | 13 | 3 | 13 | 4 | 123 | 5 | 149 | 13 |
| 1952 | Apr. | 14 | 3 | 15 | 3 | 118 | 11 | 134 | 14 |
| | Oct. | 12 | 4 | 8 | 4 | 84 | 9 | 115 | 15 |
| 1953 | Apr. | 11 | 4 | 14 | 3 | 69 | 9 | 94 | 16 |
| | Oct. | 14 | 4 | 12 | 3 | 66 | 15 | — | — |
| 1954 | Apr. | 12 | 4 | 11 | 3 | 58 | 14 | 82 | 21 |
| | Oct. | 12 | 4 | 13 | 3 | 55 | 20 | 79 | 28 |
| 1955 | Apr. | 15 | 5 | 11 | 2 | 51 | 20 | 77 | 27 |
| | Oct. | 16 | 3 | 10 | 3 | 52 | 25 | 78 | 31 |
| 1956 | Apr. | 18 | 3 | 11 | 2 | 51 | 20 | 80 | 26 |
| | Oct. | 15 | 6 | 10 | 8 | 47 | 29 | 63 | 43 |

48. Following complaint from the plaintiff that the PMA graders were biased and prejudiced in grading eggs for delivery under the contracts now in suit at Peoria, Illinois, an investigation was made by the USDA with respect to its own employees who were involved, as well as the plaintiff. The investigation was performed by the Compliance and Investigation Division. The plaintiff's records were examined, many of its employees were interrogated, and plaintiff's former and current business associates at various places throughout the country were contacted during the course of the investigation.

Shortly thereafter, Mr. Nichols, Mr. Altheide, plaintiff's plant manager at Peoria, Mr. McCurley, the Supervisor for the State of Illinois, and Mr. Dolson, the Supervisor for the 12-state area comprising Illinois, were discussing plaintiff's complaints. They got into quite a heated argument, Nichols charging that he had not received fair and impartial inspection, and Dolson replying that Nichols was trying to pick his own inspectors, and was trying to tell the Government what to do, but he was not going to let him do it, that he

was going to tell Nichols what to do, and that he had better learn then and there that he had to do it. Nichols said he was going to file a claim against the Government, and Dolson said that he was going to put Nichols out of business.

**49.** The plaintiff had contracts for continuous grading services with PMA for shell egg grading at its Avon plant, for shell egg grading and egg products grading, and (from October 1952) for poultry inspection at its Bushnell plant, whereby PMA was required to furnish an adequate number of graders and inspectors, either Federal or State employees or licensed, bonded employees of the company, as reported in findings 42 and 43.

During the period from January 1952 until May 1955, Mrs. Anna Chambers was the licensed, bonded shell egg grader at plaintiff's Bushnell plant. She also performed the egg products inspection and supervised the egg-breaking plant at Bushnell commencing in January or February 1953. Mrs. Zenna Richter was the licensed bonded grader at plaintiff's Avon plant during the period from January 1952 until about May 10, 1952, when she was replaced by Harry J. Brown, an NACC grader, and she finally resigned in January 1953. No other licensed, bonded grader was thereafter authorized in plaintiff's plants, except for about 2 weeks in June 1953, when Evelyn Ogden served for a trial period and was dismissed.

**50.** About May 10, 1952, Harry J. Brown was assigned to plaintiff's Avon plant and remained until about June 12, 1953. Others assigned to this plant included Julius W. Antoine, from July 7, 1953, until November 20, 1953; Ray Schute during April and May 1954; and Vitold Kilian from about June 1, 1954, until April 18, 1955, on which date he was replaced by John W. Schoonover.

Mrs. Chambers was a regular employee of Nichols & Company for approximately 20 years and the supervisor of the egg room. She was licensed as a shell egg grader about 1947 and a few years later was "bonded" as a PMA grader. She regularly issued PMA grading certificates, DA form 212, for approximately two years, until about January 1953. For a time thereafter, she was permitted to work under the supervision of the PMA inspector, but certificates showing the grade had to be signed by the PMA inspector.

51. The plaintiff's egg-breaking plant at Bushnell was approved for the production of frozen egg products under USDA grade standards about January 16, 1953. On January 22, 1953, B. W. Kempers wired Dolson at Chicago as follows:

> PMA POLICY REQUIRES PLACEMENT OF NACC BASIS PREVIOUS DIFFICULTIES AT NICHOLS, BUSHNELL, NECESSARY WE RENDER SERVICE BASIS NACC, THEREFORE UNABLE TO HONOR REQUEST FOR LICENSE BY CHAMBERS UNTIL NACC STATIONED THAT POINT

All such service was temporarily suspended at Bushnell January 24, 1953, because PMA would not permit a "bonded" grader at this plant to issue certificates, and was unable to provide a Federal or State employee.

Plaintiff protested the suspension of grading service at the Bushnell plant on the ground that its competitors were having continuous operations under bonded graders and suggested to McCurley that Harry J. Brown, the NACC grader at Avon, be transferred to Bushnell. McCurley declined to transfer Brown to Bushnell because of his inexperience in grading egg products, but offered to employ Mrs. Chambers as an NACC grader and permit her to continue grading there. She was not employed by PMA, but later Mr. McCurley furnished her a letter of authorization to perform grading service in plaintiff's egg-products plant. The suspension of Mrs. Chambers' right to issue certificates did not interrupt plaintiff's business.

On February 25, 1953, Mr. Dolson and Mr. McCurley visited plaintiff's egg-breaking plant at Bushnell and found it did not meet compliance requirements with respect to several items. Plaintiff was requested to eliminate wooden racks from the breaking room, provide sufficient leaker trays to handle all leakers from the candling room, and provide an additional tank in the kitchen, as the plant had three wash tanks in the kitchen when approved and it was found that plaintiff was operating with only two tanks. Plaintiff was also advised that a further check would be made at the plant.

52. Mrs. Chambers supervised the egg-breaking production and graded eggs until her stamp and other Government papers were again taken up, about the end of April 1955, and all of plaintiff's service contracts were terminated, as hereinafter reported. However, she was not permitted to issue complete USDA grading certificates recognized by the trade, but a type of certificate on the regular form DA-212, showing the volume of eggs graded, a specimen of which reads as follows:

2894 CASES U.S. EXTRAS GRADE A
ABOVE EGGS PACKED IN ACCORDANCE WITH OFFICIAL GRADING UNDER CONTINUOUS SUPERVISION, AND ARE COVERED BY WORK SHEETS ON FILE.

These certificates were summarized monthly and submitted to the PMA State supervisory office from which Nichols & Company was billed monthly, in accordance with contract charges reported in finding 42.

53. About May 10, 1952, Harry J. Brown was assigned to plaintiff's Avon plant as NACC shell egg grader, and graded eggs at both the Avon and Bushnell plants. He also performed some of the grading of eggs for delivery under the plaintiff's contracts at Peoria and Memphis. He was a USDA grader for many years, first licensed for poultry grading about 1933 or 1934, and as a shell egg grader about March 1952.

About February 20, 1953, Brown was charged by defendant with misplacing and mishandling of his official grading stamp and some months later was requested to resign and did resign from the service. On June 10, 1953, immediately after Brown resigned from PMA, he was employed by Nichols.

54. On November 26, 1952, Harry J. Brown inspected and graded two lots of eggs for Nichols & Company at Avon, indicating on the said certificates that Weinberg Bros. of Chicago was the buyer. Thereafter, on December 4 and 5, 1952, two grading certificates were issued by Lester R. Schrimsher at Laredo, Texas, bearing the same lot numbers carried in plaintiff's Avon plant and the same number of

cases in each respective lot, that show a large "loss" in the eggs. Comparisons follow:

| | Brown | Schrimsher |
|---|---|---|
| AVON LOT NO. 426723 | | |
| Certificates issued | Nov. 26 | Dec. 4. |
| Number of cases | 575 | 575. |
| Samples inspected | 15 | 15. |
| Official grade and size | U.S. Standards 79.74% B quality. | "No Grade." |
| Loss | 1.87% | 82.4%. |
| AVON LOT NO. 426724 | | |
| Certificates issued | Nov. 26 | Dec. 5. |
| Number of cases | 525 | 525. |
| Samples inspected | 15 | 15. |
| Official grade and size | U.S. Standards 78.2% B quality. | "No Grade." |
| Loss | 2.2% | 17.7%. |

The certificates issued by Schrimsher indicate that Julian Trevino was the applicant, Weinberg Bros. was the shipper or seller and the receiver or buyer "To be sold," and that they were examined at the Cantu Fruit Co., Laredo, Texas. These certificates were incorrectly prepared, in that they failed to show the warehouse lot number where they were examined, but reflect the same lot numbers under which they were examined at the Avon, Illinois, plant No. 625 of plaintiff.

Schrimsher was first employed October 27, 1952, as a trainee-grader at the PMA Des Moines office. He was transferred to the Dallas, Texas, office December 1, 1952. The certificates issued by Schrimsher on December 4 and 5, 1952, were the first official grading certificates he had issued.

55. The two lots of eggs covered by certificates in the previous finding were returned to Chicago on December 15, 1952, but Weinberg Bros. was unable to sell the eggs of one lot and declined to pay Nichols for them.

When the eggs were reshipped to Chicago, and while still at Weinberg's loading docks, Weinberg first had his inspector examine them and then telephoned Mr. Dolson of PMA to have an inspector examine them. Mr. Dolson came over himself and made an informal examination of a group of eggs from the lot and described them as "rotten." No complete inspection was made and no official inspection report was made as a result of this examination.

Thereafter Nichols & Company brought suit against Weinberg Bros., in Civil Action No. 52-252-L, in the Circuit Court of Fulton County, Illinois, for recovery of the price of one lot of eggs for which Weinberg Bros. refused to pay.

In May 1954 Mr. Schrimsher's deposition was taken in connection with plaintiff's suit against Weinberg Bros., but he was not permitted by PMA to sign the same on the ground that his office in Dallas had not first received a copy of it.

56. On March 12, 1953, plaintiff was advised by Dolson that Harry J. Brown was not to grade any shell eggs until further notice, but that grading service would be provided from the PMA Chicago or Springfield offices without additional charges until Mr. Brown was advised that he would again be permitted to officially grade shell eggs at plaintiff's plants.

After Brown had resigned on June 10, 1953, no other Government-employed grader was available for assignment as a resident grader at plaintiff's plants, and plaintiff refused to pay for a temporary grader working out of Chicago.

The plaintiff's contracts for PMA grading services in effect during 1953 provided for a charge equal to the salary costs paid to each grader assigned to the plant by PMA, including earned annual leave and sick leave when necessary. These contracts also provided, in part, as follows:

> (iii) A charge of $25.00 for each additional grader or replacement of a previously assigned grader to the designated plant; *Provided*, That, no charge under this subdivision (iii) is to be made for temporary relief graders for regular graders or for the replacement of a grader who is a Federal employee when the replacement is made by PMA other than at the request of the applicant;
>
> * * * * *
>
> (vi) A charge for the actual cost to PMA of any travel and per diem incurred by each grader assigned to the plant while in the performance of grading service rendered the applicant;

The plaintiff was satisfied with the services rendered by Harry J. Brown, and protested the suspension of his services by letter of March 13, 1953, to Dolson, which reads, in part:

The situation must be desperate for someone in regards to the action taken on Harry Brown. It is of no concern to me but being human it seems a terrible thing to see an honest man like him get thrown to the wolves to protect and cover other situations. The true facts are still a matter of record regardless of attempts to warp them and are available and will be made available at the opportune time.

* * * * * *

After all this fuss about Brown being in Bushnell etc. and my letter to McCurley which is still unanswered (Jan. 24, 1953) I was indeed surprised when Mr. Crosson picked up Mrs. Anna Chambers stamps and papers. I suppose the next deal will be to pull the frozen egg inspection service. What is the reason that she is not being allowed to inspect shell eggs?

After his resignation from PMA, Mr. Brown was employed by Nichols & Company, and has continued in plaintiff's employ.

57. About the end of January 1953, Mrs. Zenna Richter, a bonded, licensed grader at plaintiff's Avon plant, resigned, and plaintiff immediately applied for another bonded grader as a replacement.

During the period from about March 12 to June 12, 1953, while Harry J. Brown was under suspension and until his resignation, the plaintiff was provided shell egg grading service by other PMA graders from Springfield at no additional cost to plaintiff, but no bonded grader was authorized.

A letter, by Howard H. Gordon, PMA Administrator, USDA, dated August 13, 1953, to Congressman Robert B. Chiperfield, states, in part:

In connection with Mr. Nichols' complaint regarding delay in the installation of a shell egg grader at his Avon plant, we do not understand his concern. During the entire period referred to, from April 2, 1953, until June 10, 1953, when the installation was made, grading service was provided by fee graders from the State supervisor's office with no additional charge to Mr. Nichols over and above that which would have been made with the licensing of the bonded grader, Miss Evelyn W. Ogden.

As to the reason for the delay, it so happens that a problem arose concerning some product which had been graded at Mr. Nichols' Bushnell plant by a Government grader. The product was improperly graded and certi-

fied. As is customary in such cases, an investigation was conducted to determine the facts incident to such matter, including a determination as to whether plant management was in any way involved in influencing the improper action. We did not deem it desirable to proceed with the installation of the bonded plant employee as a licensed grader during the course of this investigation although, as indicated, service was rendered by State personnel.

Following the conclusion of the investigation and the determination that there was no evidence of improper action by the plant management in connection with the above-mentioned improper grading and certification, the bonded grader was installed on June 10 at the Avon plant. However, when this grader was checked on June 22, 1953, by Mr. Robert A. Dorsett with regard to her ability to grade eggs according to Federal standards, he found that she did not meet our standards of proficiency and her license was withdrawn. * * *

There is no evidence which establishes that plaintiff was thereafter authorized to employ a "bonded" grader at its Avon plant. However, Mrs. Chambers, a "bonded" shell grader at Bushnell, was also licensed to inspect and issue certificates on egg products.

58. The next regular NACC grader assigned by PMA under plaintiff's contracts was Julius W. Antoine. He was assigned July 6, 1953, as a poultry and egg grader. He had formerly worked for Swift & Company for some 28 years and as plant superintendent for about 11 years. He had served as an NACC grader for many years on poultry grading at the Swift & Company plant. He was reemployed by PMA and assigned to plaintiff's Bushnell plant to grade eggs and to supervise the work performed by the bonded grader. He was the only qualified poultry grader assigned to plaintiff under its poultry grading contract, but plaintiff never operated its poultry-dressing plant under Government inspection.

Because of criticism of his work and the constant checking by PMA officials, Antoine resigned on November 20, 1953. He was considered for reemployment, but Mr. Dolson recommended against his assignment at Bushnell, stating: "I am not satisfied that Mr. Antoine did the best job he could at Bushnell."

**59.** During the period from November 20, 1953, until Ray Schute was temporarily assigned to both of plaintiff's plants as grader in charge and inspector in charge, about April 1, 1954 (see finding 43), plaintiff had no NACC grader assigned to service its four contracts with PMA. During this period Mrs. Anna G. Chambers was the only bonded grader in plaintiff's employ, and she was licensed to inspect egg products and to grade shell eggs, but was not permitted to issue shell egg grade certificates.

In November 1953 Mr. Dolson proposed to provide plaintiff grading service by an experienced man in the Chicago area. Plaintiff declined this service because of the higher costs involved, and suggested the names of nine residents of Bushnell who were both qualified and experienced and who would probably accept Government employment on the same terms as were made with Mr. Antoine.

Again about December 29, 1953, Mr. Dolson proposed to transfer Vitold Kilian, an experienced NACC grader, from Sauk City, Wisconsin, to Bushnell, under terms which plaintiff agreed to accept about March 10, 1954. Mr. Kilian was finally transferred and assigned to plaintiff's Bushnell plant about June 1, 1954.

**60.** Mr. Vitold Kilian was assigned to plaintiff's Bushnell plant from June 1, 1954, until April 18, 1955. He was a licensed NACC grader for shell eggs, with one year's prior experience at Sauk City, Wisconsin. He did not have a license to inspect frozen egg products, but McCurley, who was his immediate supervisor, gave him permission to do so. He graded shell eggs at both Avon and Bushnell, but never supervised the grading performed by Mrs. Chambers. There is no evidence of any complaints regarding inspection or grading services during the remainder of 1954. Kilian performed unofficial inspection on incoming eggs for Nichols and cooperated with plaintiff whenever time permitted and he was not engaged in official inspection and grading.

**61.** Early in 1955 the plaintiff organized the "Tri-State Poultry & Egg Dealers Cooperating Marketing Plan" sometimes referred to as the Randolph Plan, the latter being a similar organization which had successfully operated in Iowa. Under the plan plaintiff was to act as the sole marketing agent for all cooperating dealers, and all such dealers

were expected to purchase supplies through the marketing agency. The plaintiff was to receive a stipulated fee per case of eggs for various specific services, including handling, refrigerating, assembling, and selling, also for hauling, processing, and strapping. All dealers would receive the market price for the eggs marketed. Some 39 dealers joined the plan, including 28 in western Illinois, ten in southeastern Iowa, and one in northwestern Missouri.

**62.** By circular letter dated March 18, 1955, to the cooperating dealers, the plaintiff announced that the marketing program would be commenced on Monday, March 28th. During the immediate period following the inauguration of the plan plaintiff marketed a substantial amount of eggs. Approximately 37,330 cases were handled from March 28th to May 13, 1955, having a value of approximately $411,000.

**63.** On March 24, 1955, L. Ward Wagner received travel orders to review egg processing operations in Illinois, Indiana, and Missouri, and arrived at plaintiff's Bushnell plant in the afternoon on April 4, 1955, with Lloyd Fletcher and Thomas S. McCurley. They found approximately one-half a lot of eggs inspected and marked for delivery on an Army contract. They were outside the cooler in the warehouse area, stacked on dollies of about 20 cases to the dolly and packed tightly together. Wagner took the temperature of the cases and of invidual eggs in the cases, which reportedly registered from 66° to 70°. In taking the temperature of an egg the thermometer was inserted into the egg and the egg was held in his hand. Mr. Kilian had inspected that part of the lot in the morning and had gone to Avon to examine the other half of the lot, a distance of about 11 miles.

**64.** Upon arriving at Avon, Wagner inspected the work-sheets and certificate prepared by Kilian for this lot of eggs. Kilian had recorded a temperature of 46° to 49° for the eggs when taken that morning. The Army contract called for the temperature of the eggs "when loaded." The lot had been only partially loaded, and that part was at Avon. The Army contract required that temperatures of the eggs should be kept under 50° F.

Mr. Kilian was accused of incorrectly taking and recording the temperatures for these eggs, based on a conclusion that it would be impossible for the eggs to warm up 20°

between the time Kilian took the temperature and the time Wagner took the temperature, with the cases packed tightly together with about 20 cases on each dolly. Kilian was required to telephone the Army receiving officer and to give the temperatures taken by Wagner for this lot of eggs. The eggs were rejected.

**65.** The half load, or lot, of eggs at Bushnell was inspected and graded by Kilian in the cooler and then moved into the storage area and the temperatures taken. Kilian denied that his temperatures were incorrect as taken and recorded, but conceded that his report was incorrect in that the Army contract for the eggs required the recording of temperatures only after they were loaded on the truck.

The storage area where the eggs were left on dollies in the Bushnell plant was a brick structure with concrete floor, and unheated. Wagner testified that he found the room temperature to be 65° by a different thermometer at the time he checked the temperature of the eggs. The temperatures on April 4, 1955, at the nearest point where climatological data were recorded (about 12 miles from Bushnell) were a maximum of 61° and a minimum of 45°.

**66.** Thereafter Kilian was transferred, effective April 18, 1955, to Illiopolis, Illinois, some 120 miles from Avon. When he was first assigned to Nichols' plants in June of 1954, he was advised to make sure that USDA instructions were carried out, to be on the lookout for wrongdoing at the Nichols plants, and that the friction between Nichols and PMA officials was an unpleasant feature of the assignment there. During his assignment there, Nichols officials never argued with him over his inspection and grading determinations, and there was comparative harmony at the Nichols plants. Because of his previous good record, it was the determination of PMA officials that a transfer was for his own best interests.

**67.** Mr. John W. Schoonover arrived at plaintiff's plants April 15, 1955, with Mr. Dolson and Mr. McCurley. He learned of the assignment only the day before. He went there as a shell egg grader only, but was to have the assistance of Mrs. Chambers, a bonded grader and egg products inspector. The record does not establish that Schoonover had any experience with PMA inspection and grading

service prior to the time he was assigned to plaintiff's plants, but he was an experienced shell egg grader. He performed egg grading service for H. B. Christian from 1935 until 1943, when he went into military service. In 1946 he joined the inspection service of the Chicago Mercantile Exchange under Chief Inspector Herbert L. Hentschel, and continued there until the Government took over the inspection work of the exchange. Thereafter he was engaged in the egg business for himself in Chicago. His first official employment, according to his personnel record, initiated May 4, 1955, on the recommendation of Mr. Dolson for his appointment as a poultry products grader instead of a shell egg grader, unclassified. The appointment was approved by the personnel office at Chicago the same day, and finally cleared May 9, 1955. He has been engaged since that date as a poultry grader in the Chicago PMA office. He remained at plaintiff's plants until May 3, 1955.

68. In April 1955 Nichols & Company was in the process of delivering eggs on large contracts for the Army, as well as other Federal and State agencies. Its plant was substantially filled with approximately 5,000 cases of eggs with more coming in daily. The cooler was filled with eggs stacked so closely that sample cases could not be marked for inspection in various parts of the lot until they were moved.

Schoonover personally marked all samples, and drew the samples himself until Mr. Dolson and Mr. McCurley left the plant. Thereafter he declined to handle the cases, and would not mark his samples until plaintiff's employees broke down the stacks so that they could be marked. He inspected two lots for the Army jointly with Mr. Kilian, both of which were rejected. Schoonover participated in the grading of seven lots of eggs for delivery on Army contracts, of which he inspected two lots alone. All of these lots were rejected.

Nichols made an appeal on only one lot which was reinspected by Colonel Gould and Captain Bland of the Army Veterinary Corps, but they sustained the rejection of Schoonover.

One of Nichols' associated dealers came to the plant insisting upon the reinspection in his presence of any of his eggs which caused the rejection of a lot going to the Army. Although Nichols authorized the inspection, Schoonover de-

clined to make such an inspection, on the ground that many of the cases in the lot had been shipped out making it impossible to determine whose eggs had caused the lot to be rejected.

**69.** Despite the congestion of eggs in plaintiff's plants, resulting largely from rejected contract eggs, Schoonover would do nothing other than candle eggs. He declined to move any cases of eggs in order to mark samples, and, on at least one occasion, sat in the plaintiff's office, where other officials were engaged in their duties, the whole day, performing none of his own duties.

Mr. Nichols asked him why he had picked up the shell egg stamp from Mrs. Chambers at Bushnell on April 27th, and was told it was done on orders from Mr. McCurley. On the evening of the same day Nichols called Schoonover into his office, repeated his statements made earlier, and told him to get out of his plant and to stay out.

Upon instructions from Dolson, Schoonover returned the next day to plaintiff's plant, and was told by Altheide that it was Nichols' instruction that he was not to make any more inspections. He again contacted Mr. Dolson at Chicago and, upon Dolson's instructions, picked up all Government property at plaintiff's plant and returned to Chicago on May 3, 1955.

**70.** On April 27, 1955, Schoonover requested the shell egg stamp and grading certificate forms from Mrs. Chambers and issued her a receipt for them. But, before releasing them, she telephoned McCurley. Mr. McCurley confirmed his instructions to her by memorandum on the same date, reading, in part, as follows:

> This will confirm our telephone conversation of this a.m. whereby I instructed you to turn over to Mr. Schoonover the Shell Egg stamps and the Shell Egg Certificates that you have in your possession and for him to give you a receipt for the Shell Egg Certificate that have been assigned to you.
>
> * * * * *
>
> You are to keep in your possession the Frozen Egg Stamps and the processing and packaging certificates as you are the supervisor of Egg Breaking Operations. This same subject was written down on the 228 of which

you read and signed when I was in the plant Tuesday p.m., April 26, 1955.

Mrs. Chambers was instructed to assist Schoonover in shell egg grading at the Bushnell plant only if, in his opinion, he needed any grading assistance.

By telegram to PMA grading branch on April 30, 1955, plaintiff demanded the immediate reinstatement of shell egg grading service at its Bushnell plant in accordance with its contract. A reply was made by Mr. Hamann to plaintiff that grading service at Bushnell had not stopped but that service at both plants was rendered through civil servant Schoonover, assisted at Bushnell by Mrs. Chambers, the same arrangement as agreed to April 1, 1954, but that all requests for lot grading were to be made to Mr. Schoonover.

On May 3, 1955, upon the termination of plaintiff's contracts as hereinafter reported, Schoonover took over all remaining Government property held by Mrs. Chambers, and itemized it on the receipt under date of May 3, 1955. At the same time, Mr. Schoonover removed all official grading stamps and other Government property from plaintiff's plants, on instructions from Mr. Dolson.

71. On May 2, 1955, plaintiff advised its associated dealers that eggs would be accepted during the remainder of that week, but that remittances could not be made until grading results were established, and that eggs would be accepted for the following week only for those who were unable to find other satisfactory outlets.

Nichols wrote them that plaintiff intended to dispose of its plants as soon as possible and suggested that the dealers establish their own grading service and marketing outlets.

72. On April 22, 1955, plaintiff sent a telegram to Hermon Miller, Deputy Chief of Dairy and Poultry Inspection Service, PMA, requesting immediate replacement of Schoonover not later than April 25th, or a waiver of inspection service until satisfactory service could be installed, on the ground that Schoonover had broken the service contracts by refusal to grade the lots of eggs offered, worked overtime extensively without permission, spent an unreasonable amount of time making inspections, insisted that employees of plaintiff do his work, and generally disrupted the entire operation to

such an extent that, unless immediate cooperation was received from the Department, it would undoubtedly be necessary to cease operations. Request was made for two additional graders by Monday, April 25th.

On April 25, 1955, L. W. Fletcher wired Nichols that an additional grader could be furnished Monday at $4 per hour plus expenses, requesting advice if not agreeable.

In his reply dated April 26th, Mr. Hamann advised plaintiff that investigation did not reveal that Schoonover had been negligent and that the Department considered his services satisfactory, but, in reviewing the workload, it might be advisable to assign additional graders to plaintiff's plants to properly handle the increased work resulting from its expanding program. This telegraphic reply further stated:

> * * * If you wish to apply for cancellation without consideration to the 30 day clause we will consider your application on this basis.

**73.** On April 27, 1955, plaintiff wrote Mr. Hamann, Chief of the grading branch, PMA, in part, as follows:

> * * * I realize as you also do that complete cancellation of your contract for USDA service will undoubtedly automatically cause us to cease operations. If for any reason you feel after finding out the true facts that cancellations of your contracts are in order we will accept your decision and close the business.
>
> * * * * *
>
> 13. We are left no alternative from your telegram but to accept the present grader Mr. Schoonover or request cancellation; It is impossible for us to accept the present grader under the circumstances either physically, financially, or mentally and altho we would like to receive the service on the proper basis and do not wish same must request immediate cancellation unless given reconsideration by yourself or a superior. This is of course with waiver of the 30 day clause as the extra charges and loss now incurred are more than we can absorb.

In this letter Nichols reviewed the entire situation from the time Schoonover came to plaintiff's plant. Finally he stated, "I am tired and feel that fighting government bureaucracy is an unsurmountable obstacle. Unless you reconsider and give us the cooperation and service we need and desire please cancel the service as soon as possible."

By telegraphic night letter, dated April 29th, Mr. Hamann wrote plaintiff:

> Reference your wire to Herman Miller April 22, 1955 your letter handled to L. Fletcher April 25 1955 and our wire to you April 26 1955 Please clarify your statements requesting waiver of service and discontinue our present business do you desire to cancel your contracts for grading service and request that we waive the 30 day cancellation clause please advise immediately.

74. An April 29, 1955, plaintiff wired Mr. Hamann of PMA as follows:

> Retel yours 29th waiver not granted as per our telegraphed request and damage which could been avoided now done neither was request letter. Fletcher granted and balance situation continuing meantime our dealers met and are desirous continuing business if possible please read our letter 27th and advise accordingly suggest you give serious consideration to reconsidering entire situation before making a decision and consider replacing present inspector with one from some country point that has had no contact personally or otherwise with Dolson or Chicago situations and one who is in a position to give fair and impartial gradings this is certainly not an unusual request and will definitely show that you are trying not only to cooperate but are willing to see we and our cooperating dealers get a fair break. For your information there are several people available in this area with experience to qualify them for not only shell eggs but frozen eggs. Several also available in Iowa.

A second telegram to Mr. Hamann on April 29, 1955, read as follows:

> Retel add to previous wire this date stop note your wire states contracts plural when at issue is contract here and Schoonover be advised we wish to continue contracts Bushnell plant and same should be left alone unless you are deliberately attempting to void them.

The plaintiff's contracts were cancelled by wire of May 3, 1955, by Henry G. F. Hamann as follows:

> As requested in your letter of April 27, 1955 and because of actions taken by you and Mr. Altheide on May 2 and 3 in barring Schoonover from your plant all contracts for grading services with the Agricultural Marketing service to be furnished at Avon and Bushnell are hereby

cancelled, effective close of business May 3, 1955 the acceptance of your notice of cancellation of contracts does not affect your privilege of requesting non-contract grading under the regulations.

75. The plaintiff protested the cancellation of its grading and inspection contracts on May 4, 1955, by telegram to Mr. Hamann as follows:

> In reply to your telegram May 3rd cancelling contracts made no request for any cancellation. In our letter April 27th, 1955 we offered to accept your decision on questions after personal investigation by you here which you did not make that offer now withdrawn did not bar Schoonover from plant and demand full and specific statement of facts on which you based that statement also demand full compliance with all grading contracts reserving all rights thereunder further demand full answer to all letters and telegrams past few weeks and continued services under existing contracts with your department.

Mr. Hamann replied to the above by telegram May 4, 1955, as follows:

> Reurtel May 4 my wire to you April 26 advised we did not consider Schoonover as having been negligent his performance of duties since you asked him to leave plant afternoon of May 2 and Altheide advised him May 3 that his services not wanted cancellation of your contracts effected in compliance request contained in item 13 page 6 your letter April 27.

76. Immediately after cancellation of its grading service and inspection contracts, the plaintiff began negotiations for the reinstatement of them. The defendant declined to reinstate the old contracts or to replace them. On June 15, 1955, the Assistant General Counsel, USDA, submitted to plaintiff's counsel a proposed new agreement, which reads as follows:

> Upon consideration of your oral and written requests for the reinstitution of shell egg and egg products inspection services under contract in your plants at Avon and Bushnell, Illinois, it has been determined that the Department can provide such services. We understand that you do not desire the contract shell egg grading service to be activated immediately because of lack of such volume as would warrant this action. However,

we understand that you wish the egg products inspection service activated under contract at this time.

Pursuant to your request the Department will initiate contract shell egg and egg products inspection service at the above-mentioned plants subject to the same terms and conditions provided for in your contracts for inspection service which were cancelled on May 3, 1955, provided that:

1. The provisions with respect to shell egg grading will remain inoperative until you notify us as to the exact date you wish contract service to commence. Your notification shall be in writing, allowing 15 days during which time we will secure a Federal or State employee (NACC) grader to supervise all official grading services performed under these contracts. Pending assignment of such grader hereunder, you, of course, may request regular fee grading inspection with respect to shell eggs at these plants. You will not be required to pay any additional charge as a condition precedent to the assignment of such grader hereunder other than the inauguration charge referred to below.

2. With regard to egg products inspection, you will not be charged a survey charge in the absence of changes in your facilities since the cancellation of your previous contracts. However, you will be expected to pay the regular inauguration charge of $100 in advance of initiation of egg products inspection service. A company employee (Mrs. Chambers) will be licensed to supervise egg processing operations under the contract; all product packed will be given a final inspection by an authorized Federal or State employee grader after freezing but prior to shipment, and you will reimburse the Department on the usual and published fee basis for these final inspections regardless of whether or not certificates are requested. You will, upon being billed, be expected to reimburse this Department for such fees and the proper administrative charges each month.

3. Final inspections hereunder shall be by or under the direct supervision of an authorized Federal or State employee grader and certificates shall be issued only by such graders.

The inauguration of service as herein provided shall be without prejudice to the rights or position of the Government or yourself with respect to any controversy relating to the cancellation of your previous contracts for shell egg and egg products inspection service.

If the foregoing is satisfactory and approved by you, your indicating your concurrence in the space provided

below will constitute this as the contract under which inspection service will be rendered at your plants.

The plaintiff declined to enter into a new agreement for service.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and its petition is therefore dismissed.

U. S. GOVERNMENT PRINTING OFFICE: 1952

**Proceedings following opinion of the court**

**Order**

These cases come before the court on motions for rehearings, reconsideration, reargument, retrial, relief from judgments, to amend judgments and for further relief under Rules 53 and 54 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this ninth day of May, 1962, that said motions be and the same are overruled as follows:

98-54 Nichols & Company, Plaintiff's motion.

BY THE COURT
/s/ MARVIN JONES
Marvin Jones
*Chief Judge*

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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 418

NICHOLS & COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion (Pet. App. 1-20) and findings of fact (Pet. App. 20-74) of the Court of Claims have not yet been reported.

### JURISDICTION

The judgment of the Court of Claims dismissing petitioner's claim was entered March 7, 1962. A motion for rehearing was denied on May 9, 1962. By order of July 26, 1962, Mr. Justice White extended the time for filing a petition for certiorari to September 6, 1962,

on which day the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

## QUESTION PRESENTED

Petitioner, an egg wholesaler, contracted with the Government to furnish eggs of a specified quality for use in the school lunch program. Government inspection and grading disclosed that large quantities of the eggs offered by petitioner were sub-standard and the eggs were accordingly rejected.

The principal question presented by this case is whether the Court of Claims correctly found, on the evidence before it, that the eggs were properly rejected as sub-standard and that there was, therefore, no breach of contract by the Government.

## STATUTES AND REGULATIONS INVOLVED

The Act of August 14, 1946 [Agricultural Marketing Act of 1946] § 203, 60 Stat. 1087, 7 U.S.C. 1622 (1952), provided in pertinent part:[1]

> The Secretary of Agriculture is directed and authorized:
>
> * * * * * *
>
> (h) To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as

[1] Amended subsequent to the time here pertinent by the Act of August 9, 1955 § 1, 69 Stat. 553, 7 U.S.C. 1622(h) (1958).

may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no person shall be required to use the service authorized by this subsection. Any official certificate issued under the authority of this subsection shall be received by all officers and all courts of the United States as prima facie evidence of the truth of the statements therein contained.

7 C.F.R. 55.22-55.29 (1953) provided: [2]

§ 55.22 *When appeal grading may be requested.* An application for an appeal grading may be made by any interested party who is dissatisfied with any determination stated in any grading certificate, if the identity of the samples, or the product, has not been lost; and such application for an appeal grading shall be made within two days following the day on which the grading was performed. Upon approval by the Administrator, the time within which an application for an appeal grading may be made may be extended.

§ 55.23 *How to obtain appeal grading.* Appeal grading may be obtained by filing a request therefor (a) with the Administrator, (b) with the grader or inspector who issued the grading certificate with respect to which the appeal grading

[2] Now 7 C.F.R. 55.50-55.57 (1959).

is requested, (c) with the immediate superior of such grader or inspector, or (d) with the officer in charge of any office of grading. The application for appeal grading shall state the reasons therefor and may be accompanied by a copy of the aforesaid grading certificate or any other information the applicant may have secured regarding the product, at the time of grading, from which the appeal is requested. Such application may be made orally (in person or by telephone), in writing, or by telegraph. If made orally, written confirmation may be required.

§ 55.24 *Record of filing time.* A record showing the date and hour when each such application for appeal grading is received shall be maintained in such manner as the Administrator may prescribe.

§ 55.25 *When an application for an appeal grading may be refused.* If it appears to the Administrator that the reasons for an appeal grading are frivolous or not substantial, or that the quality or condition of the products has undergone a material change since the grading from which the appeal is made, or the identical products graded cannot be made accessible for regrading, or the act or this part has not been complied with, the Administrator may refuse the applicant's request for the appeal grading; and such applicant shall be promptly notified of the reason for such refusal.

§ 55.26 *When an application for an appeal grading may be withdrawn.* An application for appeal grading may be withdrawn by the applicant at any

time before the appeal grading is made upon payment, by the applicant, of all expenses incurred by the Service in connection with such application.

§ 55.27 *Order in which appeal gradings are performed.* Appeal gradings shall be performed, insofar as practical, in the order in which applications therefor are received; and any such application may be given precedence pursuant to §55.17.

§ 55.28 *Who shall make appeal gradings.* An appeal grading of any graded product shall be made by any grader (other than the one from whose grading the appeal is made) designated for this purpose by the Administrator; and, whenever practical, such appeal grading shall be conducted jointly by two such graders.

§ 55.29 *Appeal grading certificate.* Immediately after an appeal grading has been completed, an appeal grading certificate shall be issued showing the results of such appeal grading; and such certificate shall supersede the grading certificate previously issued for the product involved. Each appeal grading certificate shall clearly identify the number and date of the grading certificate which it supersedes; and such supersedure shall be effective as of the time of issuance of the appeal grading certificate. The provisions of §§ 55.18 to 55.21, both inclusive, shall, whenever applicable, also apply to appeal grading certificates except that copies of such appeal grading certificates shall be furnished each interested party of record.

## STATEMENT

Petitioner, on March 5, 1954, filed its petition in the Court of Claims alleging, in five counts, causes of action with damages totalling over $1,000,000 arising out of its dealings with the Production and Marketing Administration (hereinafter referred to as PMA) of the United States Department of Agriculture (Pet. App. 1-2).

In Count I damages were claimed as the result of the alleged breach by respondent of five contracts for the delivery of approximately 58,000 cases of eggs to PMA in connection with the school lunch program. Petitioner alleged prejudice and partiality on the part of some of the inspectors who graded its eggs, refusal to inspect eggs tendered for delivery until they had been reworked, refusal to reinspect them when requested to do so, use of an improper candler in inspecting them, and other fraudulent, arbitrary, capricious and grossly erroneous actions (Pet. App. 1; Pet. 12).

Counts II, III and IV claimed damages resulting from the alleged failure of respondent to provide within a reasonable time, in accordance with the pertinent regulations, resident grading service in petitioner's egg breaking plant, approval of petitioner's cartons and labels used for marketing eggs, and resident grading service in petitioner's dressed poultry plant, respectively (Defendant's Brief and Exceptions to the Commissioner's Report 1, 2; Pet. 12).

The petition in the court below was thereafter amended to include Count V, in which damages were

claimed on the ground that the Department of Agriculture "unreasonably, arbitrarily, capriciously, fraudulently, and in bad faith," failed to make an impartial investigation of petitioner's complaints of improper grading, but, instead, sought evidence of wrongful conduct on the part of petitioner; attempted to coerce petitioner into foregoing its claim against egg dealer Weinberg Bros.; failed to furnish an adequate number of graders under the contracts; intimidated and interfered with honest egg graders, supplanting them with others who fraudulently and improperly graded petitioner's eggs; and repudiated its grading service contracts with petitioner, consenting to furnish further service only under terms which were, by comparison with other dealers, discriminatory to petitioner. (Pet. App. 1, 2; Pet. 15).

The court below made no findings with respect to Counts II, III and IV since the Commissioner of the Court of Claims had found, and petitioner had admitted on oral argument, that it had not made out a case on those counts (Pet. App. 1, 21)—or, at least, that it had been unable to prove "*full* damages" (Pet. 17).

*Facts Pertaining To Count I*

PMA, by announcement PY-61, dated April 15, 1952, offered to purchase, through competitive bids, approximately 500,000 cases of Government-graded oil processed shell eggs, of a specified quality, for use in the school lunch program (Ct. Cl. F. 4, Pet. App. 22-25). The pertinent provisions of PY-61 are set forth in Finding 4, and include, *inter alia*, a requirement that

the vendor, prior to delivery, arrange for Government inspection and grading of the eggs to be offered.[3]

Petitioner, one of the largest wholesalers of eggs in the United States (F. 1, Pet. App. 20; Pet. 10-11), submitted a bid pursuant to PY-61 which was accepted on June 19, 1952, as Contract A1PM(MF)2727 for 30 lots of eggs (15,000 cases of 30 dozen each) at an approved warehouse in Peoria, Illinois, for delivery in September and October, 1952, at a specified price (F. 8, Pet. App. 28).

A similar bid resulted in Contract A1PM(MF)2738, June 26, 1952, providing for delivery at Burlington, Iowa, of 24 lots of eggs in September, October, and November, 1952, at specified prices (F. 9, Pet. App. 28-29).

Sol Rich & Company also submitted bids resulting in Contracts A1PM(MF)2691, 2695 and 2732, which provided for delivery at Peoria and other cities of 96 lots of eggs, 64 lots as broker for petitioner (F. 10-13, Pet. App. 29-30).

Petitioner thereupon made arrangements for Government grading of the eggs which it intended to offer for delivery. Most of the eggs in storage at Peoria, and some at Burlington, Memphis and St. Louis, failed to meet the contract specifications because of loss in excess of the strict standards of PY-61 (F. 26-

[3] Pursuant to 7 U.S.C. 1622 and the Secretary's regulations thereunder, 7 C.F.R. Part 55, the Department, through PMA, provides inspection and grading services for egg and poultry dealers and processors whereby these commodities can be priced and traded under standard classifications (F. 2, Pet. App. 21). The grading is performed by a process of sample selection and candling, described in detail in Findings 18-22, Pet. App. 33-38.

28, Pet. App. 39-40). As a result, petitioner was required to rework [4] the sub-standard lots and obtain extensions of time for delivery, thus bringing into play the contracts' late-delivery penalty provisions (F. 15-16, Pet. App. 31-32).

Petitioner contended that the lots offered for inspection at Peoria failed to meet PY 61 requirements only because they were fraudulently undergraded by two of the Department inspectors, McCurley and Young (F. 17, Pet. App. 32-33; compare F. 29-32, Pet. App. 40-44). Petitioner did not avail itself of the appeal provided in the administrative regulations for egg dealers who, like petitioner, thought any particular grading was improper: 7 C.F.R. 55.22-55.29 (F. 32, Pet. App. 44). Nor did it invoke the formal provisions of the disputes clause incorporated by reference into the contracts here involved (F. 4-5, Pet. App. 22, 23, 25, 27; Pet. 40-42). Petitioner did, however, complain to Washington (F. 33, 36, Pet. App. 44-45, 46-47). Resultant investigation failed to substantiate petitioner's claim (F. 34, Pet. App. 45-46).

The damages sought under this Count consist of the costs of reworking the eggs and penalties for late delivery (Pet. App. 5).

*Facts Pertaining To Count V*

As already noted, the Department of Agriculture provides inspection and grading services for egg and poultry dealers and processors so that their commodi-

[4] Reworking required that petitioner's employees candle the eggs and replace those exceeding the loss tolerances with better eggs (See Pet. App. 4, p. 1).

ties can be priced and traded under standard classifications (F. 2, Pet. App. 21). PMA provides resident graders under grading service contracts with the dealers; these graders may be either Government employees (the so-called NACC graders) or licensed employees of the applicant, bonded to insure proper performance of their duties. The former are Civil Service employees paid by the Department, which is in turn reimbursed by the dealer. The salaries of the latter group are paid by the dealer himself and they are responsible directly to him (F. 43-44, Pet. App. 51-53).

Because of a personnel shortage after World War II, the practice of using licensed graders became quite prevalent. However, in May, 1952, PMA initiated a policy—explained in Instruction No. 918 (PY)-4—of utilizing NACC graders and substituting them for licensed graders. Where necessary, licensed graders would be permitted to assist NACC graders, but the latter were alone responsible for issuing the official Government grading certificate (F. 45-47, Pet. App. 53-56).

Petitioner entered into various contracts (to be distinguished from the Count I contracts) for resident grading services at its Avon and Bushnell, Illinois, plants during the period 1952-1955. The pertinent provisions common to each of these contracts are set forth in Finding 42, Pet. App. 50-51.

Petitioner's first NACC grader, Harry Brown, was assigned in May, 1952, to replace licensed grader Richter, and continued in that capacity until a shipment of eggs sold to Weinberg Bros. was found at its destination to be completely sub-standard, although it

had been given a relatively high grading by Brown. Brown was suspended and subsequently resigned. He was then hired by petitioner (F. 53-56, Pet. App. 59-62). During various periods thereafter, NACC graders Antoine, Schute, Kilian and Schoonover intermittently served petitioner, assisted by licensed grader Chambers. Mrs. Chambers' authority was limited, however, pursuant to the policy expressed in Instruction No. 918, *supra* (F. 50-52; Pet. App. 57-59).

Schoonover replaced Kilian in April, 1955. Petitioner had sent a letter to Washington in March of that year setting forth the results of an alleged statistical study of egg grading in the Chicago area and arguing that the results were indicative of fraud (Pet. 50; see F. 39-41, Pet. App. 48-50). Also in early 1955, petitioner had participated in the formation of the "Tri-State Poultry & Eggs Dealers Cooperating Marketing Plan" (F. 61-62, Pet. App. 64-65). An inspector from Washington assigned at that time to review operations in Illinois, Indiana and Missouri had arrived at Bushnell and Avon. Kilian's low temperature readings on certain egg lots were found to differ drastically from much higher readings there taken by the Washington inspector. Kilian was removed (F. 63-66, Pet. App. 65-66).

Kilian's replacement, Schoonover, was subsequently accused by petitioner of undergrading and being generally uncooperative. Petitioner took an appeal as provided in the regulations on only one of Schoonover's gradings, a lot under contract delivery to the Army. Army inspectors performed the appeal grading and

their results sustained the correctness of Schoonover's grading.

Finally, petitioner ordered Schoonover out of his plant. Dolson, Superintendent of the 12-State area that included Illinois (F. 48, Pet. App. 56), directed Schoonover to remove all Government inspecting equipment (F. 67-70, Pet. App. 66-69).

Petitioner then wrote to Washington requesting reconsideration of the situation, and replacement of Schoonover by inspectors more amenable to petitioner, or waiver of cancellation notice and cancellation of the contracts. Subsequent telegrams indicated greater insistence on the first alternative than on the latter, but PMA took him at his word and cancelled the contracts (F. 73-75, Pet. App. 70-72).

Shortly thereafter, petitioner began negotiations for reinstating grading services. The Department's offer of terms similar to those in the cancelled contracts was rejected (F. 76, Pet. App. 72-74).

Petitioner alleges that the actions taken by the Department of Agriculture, in connection with these grading contracts, are attributable to an attempt by Department officials to destroy petitioner's business. Damages measured by loss of profits were accordingly claimed by petitioner.

The Court of Claims, in rejecting petitioner's claims, declared (Pet. App. 3):

> In such [a heated] atmosphere, it is not easy to determine the true facts, but this we must do if we can, for, if the charges plaintiff makes are true, we have a case of outrageous official oppres-

sion, and positive dishonesty and fraud on the part of Government officers. If they are not true, plaintiff is to be severely condemned for making unsupported charges against Government officials and employees who were doing their duty.

The court in its opinion reviewed the inferences reasonably deducible from the incidents and conversations evidenced in the record (Pet. App. 1-20), made seventy-six detailed findings (Pet. App. 20-74), and concluded unanimously that, as a matter of law, petitioner was not entitled to recover. The petition was accordingly dismissed (Pet. App. 20, 74). A motion for rehearing was denied (Pet. App. 75).

## ARGUMENT

This case turns upon questions of fact and inferences to be drawn therefrom and plainly does not merit review by this Court.

The Court of Claims held simply that petitioner had failed to sustain its burden of proving wrongful, discriminatory and fraudulent conduct on the part of Government officials in the alleged breach of the contracts involved. Petitioner is here attempting to reargue its case, presenting to this Court its view of the evidence, and asserting inferences which it favors but which have been rejected by the court below after a careful review of the whole record. As already noted, the evidence before the court below concerned (a) contracts for the sale of certain quantities of eggs by petitioner to the Department of Agriculture condi-

tioned upon the government's being satisfied that the produce met specified, strict inspection requirements, and (b) contracts under which the Department, through PMA, was to provide grading services for petitioner's Bushnell and Avon plants. The former contracts were entered into upon acceptance of petitioner's bid, and were performed, although this performance entailed additional preparation and late-delivery-penalty expenses, which were occasioned by original failure to meet the loss specifications. The grading service contracts, cancellable at the option of the parties, had a stormy life until cancelled by the government at petitioner's request.

Petitioner was constantly dissatisfied with the inspection results and the grading service. Yet it failed, with one exception, to utilize the appeal procedures explicitly made available in the applicable regulations, and failed to avail itself of the procedures in the disputes clause.

1. Primarily at issue here is the weight to be given to conflicting evidence. The burden of proof was on petitioner to establish by clear and convincing evidence that Agriculture officials were guilty of fraudulent conduct, since fraud is not presumed. See, *e.g.*, *Roosth* v. *Lincoln National Life Insurance Company*, 269 F. 2d 171, 179 (C.A. 5), certiorari denied, 361 U.S. 917; cf. *United States* v. *Thompson*, 279 F. 2d 165, 167 (C.A. 10); see also *United States* v. *Colorado Anthracite Co.*, 225 U.S. 219, 226-27. He did not carry that burden. Petitioner merely suggested certain inferences which the court rejected.

For example, petitioner asserts that the contrast in egg—grading results at the various delivery points, the actions and statements of Government officials, and the sequence of events amounted to clear proof of fraudulent and dishonest grading resulting from a conspiracy to bring economic ruin upon petitioner. But the court properly found that evidence inconclusive. It said (Pet. App. 6-7):

> This indicates, but does not prove, either that the inspectors at Peoria were, at least, too strict, or the other inspectors were too lenient, or, perhaps, the quality of the eggs offered was not the same, or the inspectors at one place happened upon better samples than at another. Also, the findings show that grading is often a matter of judgment; two impartial graders might well differ in grading the same case. This is especially true here where only five eggs out of 1,500 could cause the rejection of an entire lot. The variance indicates, however, that something was wrong somewhere. It raises a question in our minds, but a question, a suspicion even, falls far short of that clear and convincing proof necessary to prove fraud.
>
> * * * * *
>
> When we weigh the evidence pro and con, we must conclude that fraud in the grading of plaintiff's eggs has not been proven. In spite of McCurley's inquiry of Nichols about sales of eggs to him on credit, and Dolson's remark that plaintiff had better do what the Department directed him to do or they would put him out of business—in spite

> of this, we think that the most that can be said is that the inspectors required strict compliance with the contracts. We are not convinced that the inspectors required more than their duty demanded. Out of 86 lots rejected, 83 were rejected because the "dirties, leakers and loss" exceeded 3/10 of one percent. Since most of the initial offerings were of eggs that had not been reworked, and since the certificates issued when the eggs were put in the warehouse in the spring showed "dirties, leakers and loss" in excess of 3/10 of one percent, in the case of 40 lots out of 59, it is not surprising that later that fall 83 out of the 165 offered should have shown "dirties, leakers and loss" in excess of 3/10 of one percent.

Petitioner has failed to show that the evidence does not support the court's inferences.

The fact that contrary inferences might have been drawn does not impair the validity of those inferences or impugn the result reached. See, *e.g.*, *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342; *Labor Board* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 659-660; *Walling* v. *General Industries Co.*, 330 U.S. 545, 550; *Labor Board* v. *Nevada Copper Co.*, 316 U.S. 105; *American Flint Glass Wkrs. Union* v. *National Lab. R. Bd.*, 230 F. 2d 212, 215-16 (C.A.D.C.), certiorari denied, 351 U.S. 988. This principle is especially important where, as here, fraudulent, discriminatory motivation is sought to be proved by circumstantial evidence.

2. Equally significant is petitioner's failure to employ available administrative remedies. The regula-

tions, 7 C.F.R. 55.22-55.29 (1953), provided for appeal gradings and set forth the procedure therefor. Only once was this right utilized, with unfavorable results. Moreover the contracts of sale included the following disputes clause (Pet. App. 27):

> Article 22. Disputes. Any dispute concerning questions of fact which may arise under the Contract and which is not disposed of by mutual agreement, shall be decided by the officer executing the Contract in behalf of the Agency or by a designee of the Agency who shall reduce his decision to writing and mail a copy to the Contractor. Within 30 days from said writing Contractor may appeal to the head of Agency, whose decision or that of his designated representative shall be final and conclusive upon the parties. Pending decision of such dispute the Contractor shall diligently proceed with the performance of the Contract.

To be sure, petitioner did complain to local supervisors and to Washington, but it can scarcely be contended that the nature of the complaints and the manner in which they were made conformed to either the regulations or the disputes clause. Petitioner's failure to exhaust his available contractual and administrative remedies tends to confirm the correctness of the dismissal of petitioner's claims by the court below. *United States* v. *Holpuch Co.*, 328 U.S. 234; *United States* v. *Blair*, 321 U.S. 730, 734-737; *United States* v. *Callahan Walker Co.*, 317 U.S. 56, 61.

3. Petitioner's evidence of discrimination and dishonesty is wholly insufficient to warrant the finding

of a fraudulent pattern of operation breaching the school lunch contracts and a conspiracy to ruin it economically, culminating in cancellation and breach of the grading service contracts.[5] On this record it is perfectly clear that the court's rejection of the inferences of motivation advocated by petitioner did not amount to a denial of due process warranting review by this Court.

## CONCLUSION

The evidence before the Court of Claims and its detailed findings adequately support its conclusion. There is no conflict of decisions or any other ground for further review. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General,*

JOSEPH D. GUILFOYLE,
*Acting Assistant Attorney General.*

MORTON HOLLANDER,
DAVID J. MCCARTHY, JR.,
*Attorneys.*

SEPTEMBER, 1962.

---

[5] The court did not suggest that Instruction No. 918(PY)-4 should have the effect of a rule, but only referred to it as an expression of an operative policy. Petitioner's argument on this point is completely answered by the grading service contract provision to the effect that "[a]t the sole discretion of PMA the graders may be either a Federal or State employee or a licensed employee of the applicant . . . ." (Pet. App. 50).

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

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No. 418

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NICHOLS & COMPANY, *Petitioner*

vs.

THE UNITED STATES, *Respondent.*

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## REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

---

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THE UNITED STATES, *Respondent.*

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## REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Respondent's opposing brief, largely by wholesale omission, and partly by misstatement of the significant facts, tends to conceal and obscure the compelling reasons why certiorari should be granted.

Respondent at some length describes the petition in the Court of Claims (Resp. Br. pp. 6-7). Apart from a misleading failure to state that Counts II, III and IV were based on contract rights to grading service (Resp. Br. p. 6; Pet. pp. 12, 18, 21-24) respondent's description neither adds to nor detracts from petitioner's statement. (Pet. 12-15)

Respondent's version of the facts pertaining to Counts I and V, as far as it goes, (Resp. Br. pp. 7-13) is also largely repetitive of petitioner's statement of the case. (Pet. pp. 27-56) What little issue respondent takes with petitioner's statement, it does so erroneously, as petitioner later demonstrates (infra pp. 15-19).

Similarly, respondent's assertion that the Court below wrote an opinion, and made 76 findings, adds nothing to petitioner's statement of the case, and hardly enlightens this Court (Resp. Br. p. 13). It is the *content* of the findings and the opinion, the *soundness* and *accuracy* of the inferences and rulings of the Court below and the consideration given the facts which are in issue, rather than the uncontroverted fact the decision includes an opinion and 76 findings.

Respondent exhibits an ostrich-like avoidance of the significant elements of the case, as petitioner by specific analysis demonstrates. (Infra pp. 15-19) In so doing it proceeds in direct opposition to the requirement of this Court's rule,[1] that it restate the case as stated by petitioner to the extent "necessary in correcting any inaccuracy or omission in the statement of the other side."

On matters concerning which there is no need to speak, respondent speaks freely; on matters strongly demanding that respondent speak, it maintains an eloquent silence.[1]

## I. THE PUBLIC IMPORTANCE OF THE LEGAL ISSUES PRESENTED

The incongruity of respondent's silence is clearly apparent in the light of the great public interest attached to the questions of law presented by the record, and which respondent ignores.

The total effect of respondent's brief is dangerously misleading. The indifference of respondent to the questions

[1] Rule 40, par. 3 The effect of respondent's silence as conceding petitioner's statement of the case is discussed infra pp. 15, 16.

of grave public interest presented by the record strongly suggests and insinuates that no such questions exist, and that instead, this Court is confronted only with trivia, unworthy of its attention.

To this misleading implication, petitioner replies at the outset.

**A. The Court Below Approved and Licensed Discriminatory Practices by USDA Affecting the Marketing of Agricultural Products**

Discriminatory practices of private individuals affecting the market of agricultural commodities are a recognized and legally prohibited evil. The public importance of freedom from such practices has been recognized by this Court in granting certiorari (*Denver Union Stock Yards Co.* v. *Producers Livestock Marketing Assoc.*, 356 U.S. 282, 2 L. ed. 2d 771 (1958)). Yet the Court below approved and in effect licensed such discriminatory practices by the USDA, the very instrument of government charged with their prevention.[2]

Burglary is no less and certainly a greater evil because committed by the police, rather than private individuals. A court would hardly grant a judicial license to the police to commit such wrongs.

Similarly the USDA should not have been licensed by the court below to perpetrate the very offenses which by

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[2] Illustrative of that duty imposed on USDA is *Denver Union Stock Yards* v. *Producers Livestock Marketing Assoc.*, *supra*. The extent and importance of USDA responsibilities are set forth in Symposium on the Regulatory Functions of the Department of Agriculture, 26 George Washington Law Review No. 2, January 1958, pp. 127-296. See particularly Farrington, The Wide Range of the Programs Administered by the United States Department of Agriculture, pp. 127-130; Flavin, the Packers and Stockyards Act, 1921, pp. 161-180 Flavin, The Functions of the Judicial Officer, United States Department of Agriculture, pp. 277-285.

law it is required to prevent. The decision to that effect should not be allowed to stand.

The discrimination practiced by the USDA involved grading service vital to petitioner's business, (Pet. 11) and included (1) complete denial to petitioner of various types of grading service (Pet. 21-24); (2) either grossly inadequate shell egg grading service to petitioner, or, for substantial periods of time, none at all (Pet. 47-50); and insistence by USDA, that whatever shell egg grading service petitioner received be of the most expensive type, through government employees, rather than through the bonded graders generally available to the trade. (Pet. 54-56; Resp. Br. 10, 11; App. F42 p. 51; F49 p. 57)

The discrimination thus practiced against petitioner in grading service was not rendered less discriminatory because also in violation of petitioner's contract rights (Pet. 48-50).

Respondent is silent concerning most of the discrimination which occurred. Following the lead of the opinion, respondent makes express mention only of the discrimination which imposed upon petitioner the more expensive type of grading service. Also, like the opinion, respondent seeks to justify that particular discrimination by the so-called "policy" embodied in Instruction No. 918 (PY)-4 of gradually replacing the inexpensive bonded grader with the more costly NACC (government employee) grader. (Resp. Br. p. 10, p. 18 fn. 5).

In its reference to this so-called "policy" Instruction, respondent blithely disregards the facts, undisputed of record, to the effect that (1) the Instruction was an internal idea, expressed in May 1952, but cancelled by higher authority in the USDA, in January of 1953, before the events occurred to which respondent seeks to make it apply; (2) it never became a regulation embodying policy; and (3) that at best it amounted to a specious and groundless effort to provide semblance of a protective cover to the discriminatory practices against petitioner (Pet. 55, 56).

Under the express provisions of the Administrative Procedure Act, *even if uncancelled* by *higher authority, and even if non-discriminatory in application* the Instruction would be invalid. (Pet. 62; infra, pp. 11, 12)

Apparently recognizing that fact, respondent in argument concedes that the Instruction never became a "rule", and in a footnote, shifts its ground, to rely instead upon a grading service contract provision to the effect that "(a)t the sole discretion of PMA the graders may be either a Federal or State employee or a licensed employee of the applicant . . ." (p. 18, fn. 5)

Thus respondent cryptically abandons reliance on the cancelled Instruction, concedes the discrimination, and seeks to validate it by the contract provision quoted. In so doing respondent assumes that the Act[3] which established the grading service authorized contract permitting the *discriminatory* exercise of discretion, by the very department charged with *prohibiting* such discrimination.

"It would seem untenable that the Federal Government which is responsible for the enactment and enforcement of . . . . regulatory statutes should not be bound by the same . . . limits on its rights of contract. . . ." (*Hughes Transp., Inc.* v. *United States*, 129 Ct. Cl. 804, 121 F. Supp. 212 (1954)).

In this contention respondent also overlooks the express prohibition in the Administrative Procedure Act[4] of agency

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[3] Act of August 14, 1946 (Agricultural Marketing Act of 1946 Sec. 203; 60 Stat. 1087; 7 U.S.C. 1622 (1952)), quoted in respondent's brief, pp. 2, 3.

[4] The above prohibition is fact in Section 10 of the Act dealing with judicial review. 5 U.S.C. 1009(e). Although phrased in terms of a directive to reviewing courts, rather than to agencies, it is nonetheless mandatory upon agencies. It is to "be given a harmonious reading to the end that the basis on which the . . . action is reviewed is coterminous with the basis on which the (agency) is allowed to act." *Harmon* v. *Brucker*, 355 U.S. 579 at 582; 2 L. ed. 2d, 503 (1958).

action which is "arbitrary, capricious (or) an abuse of discretion . . .", and which would nullify a discretionary power to discriminate, if such power would otherwise exist.

**B. The Effect of the Decision is to Encourage Discrimination and Oppression by the USDA as Well as Fraud and Corruption**

Petitioner's difficulties with the USDA were and are necessarily a matter of common knowledge in the trade, petitioner for years having been one of the nation's largest wholesalers. Mr. Nichols' testimony that as a consequence of his troubles he had become "a leper in the trade" (Tr. 1416, 1417) is undisputed; and that status he acquired from the mere fact of this trouble long before the Court's decision.

It may fairly be assumed that the trade is well aware that petitioner discovered and the Court found persistent and widespread fraud and corruption in egg grading by USDA inspectors at Chicago over the four-year period embraced in petitioner's study (1949-1952); and that the trade knows that McCurley as State Supervisor and Dolson as Area Supervisor, (Pet. 12, 13) shared at the very least executive responsibility for that fraud and its concomitant corruption.

One cannot state the extent to which the trade knows in its entirety the sordid history of the mistreatment of petitioner by McCurley and Dolson, with which respondent has taken no real issue (Pet. 21-56; Resp. Br. pp. 7-12; infra, pp. 16-19).

It may safely be assumed, however, that the trade knows well the characteristics of those men, as evidenced by Dolson's oppressive threat to destroy petitioner for seeking justice (Pet. 13); McCurley's apparent attempt to practice extortion against petitioner before grading the eggs sold USDA (Pet. 28, 29); and McCurley's persistent

falsehood and false testimony in this very proceeding, (Pet. 29, 31, 32, 37, 38, 60, 61) as well as the arbitrary and unjustified denial of grading service by both McCurley and Dolson, essential to petitioner's business, and continuing over a period of years in violation of petitioner's contract rights (Pet. 21-24).

The result reached below would of itself serve as a warning to the trade that nothing is to be gained by questioning acts of the USDA in the Court of Claims, and similarly cause officials of the USDA to derive a feeling of immunity.

But the decision went even further. It expressly stated that petitioner was to be severely condemned for making unfounded charges against McCurley and Dolson. (Pet. 20) Concerning their misconduct, the decision was discreetly silent, while affirmatively commending them as "government officials and employees who were doing their duty", (App. 3) and again as abstaining from doing anything "more than their duty demanded" (App. 7).

It is highly significant that the decision was rendered by the one court "constituted . . . precisely to the end that there may be a tribunal specially qualified to hold the Government to strict legal accounting, and "possessing a greater freedom than is enjoyed by other federal courts to inquire into the legality of governmental action." *Glidden Co.* v. *Zdanok*, U.S. ; 8 L. ed. 2d 671, at 691.

In many situations the Court of Claims is the only forum *legally* available for redress of wrongs to a citizen. (E.g. 28 U.S.C. 1346, 1491; *Larsen* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 (1948)).

Thus the one Court to which the public would naturally and normally turn to for relief, and often as a matter of

necessity, ridiculed and condemned the victim of wrong doing, and commended the wrong doers.[5]

It is difficult to conceive of stronger encouragement to wrong doing, or stronger discouragement of efforts to obtain redress in this one Court established for that very purpose.

### C. The Decision Presents Important Legal Issues of General Contract Law

The contracts of sale required the quality of the eggs sold to be determined by USDA inspection. The Court below nonetheless upheld McCurley's requirement that petitioner, following inspection of 47 lots initially offered at Peoria, rework all lots thereafter tendered, prior to their inspection or reinspection (Pet. 35-38).

Additionally, the contracts of sale specified in terms of candle power and aperture size, the candler to be used. The USDA in its inspections under the contract of sale employed instead a candler magnifying both the observable scope and the degree of the flaws detected in the candling process. In effect, it used a yardstick, rather than a footrule, as a measure of petitioner's performance. (Pet. 42, 43)

Under law as heretofore applied by this and all other courts, including the Court of Claims, both the rejection without inspection and the use of the improper candler, were breaches of contract, excusing petitioner from passing inspection (Pet. 58).

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[5] The Commissioner found and reported to the Court that there was "no evidence that plaintiff was involved in any violation of regulations pertaining to the inspection and grading service of PMA or in the production of its eggs and egg products." (F 79, R. 134) That finding is unquestionably true. Defendant took no exception to it. (Def. Excep. pp. 191, 192) Yet, conspicuously absent from the Commissioner's findings adopted by the Court is that finding of the Commissioner of petitioner's innocence of wrong doing. (App. 57)

In this proceeding those rules of law were ignored by the Court below. The record therefore presents the question as to whether that established law has now been retroactively reversed; and if so, whether this reversal applies to petitioner only, thereby resulting in a denial of "Equal Justice Under Law", the very ideal sculptured upon the front of the building occupied by this Court.

**D. The Record Presents Important Issues of Law Involving the Administrative Procedure Act**

In a variety of ways the facts call into play provisions of the Administrative Procedure Act.[6]

Most frequently involved is Section 3 of that act (5 U.S.C.A. 1002) which provides in part:

> "Rules—Every agency shall seperately state and currently publish in the Federal Register . . . (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available . . .; and (3) substantive rules adopted as authorized by law . . . No person shall in any manner be required to resort to organization or procedure not so published."

"Rule" is defined by the Act (Sec. 2(c), 5 U.S.C. 1001 (c)) in the following terms:

> ". . . 'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to . . . or prescribed the law or policy or to describe the organization, procedure, or practice requirements of any agency . . ."

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[6] Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. 1001 et seq.

**1. The Significance of Petitioner's Omission to Request Formal Appeal Grading of Lots Graded by McCurley and Young**

The Court below drew an inference adverse to petitioner because of its failure to make a formal request for appeal grading of lots which McCurley and Young had rejected. In this indirect fashion petitioner was in effect penalized for failing to request formally the permissive appeal grading authorized by the regulations (as distinguished from the contracts of sale) (Pet. 40, 41, Resp. Br. 3-5).

The regulations relating to appeal grading set forth no standards to be followed in the grading on appeal (Pet. 6, 7, 40, 41; Resp. Br. pp. 3-5). Under the express term of Section 3 of the Administrative Procedure Act, it was error to require petitioner "in any manner . . . to resort to organization or procedure not . . . published."

This is no mere technical argument. Petitioner while performing the contracts, endeavored to ascertain the standards and procedure used on such an appeal. Mr. Nichols questioned McCurley in that regard. As McCurley himself reported to USDA (Pl. Ex. 229), Mr. Nichols then

> ". . . was informed that we could not overlook what we had already found on the previous grading unless the eggs had been worked or the lot changed so that we would not be drawing our samples from the same lot of eggs . . ." (Pl. Ex. 229)

Further requests for explanation and enlightenment of the seemingly illusory nature of such an appeal were made of Mr. Termohlen, Head of the Poultry and Egg Division of USDA. They proved fruitless. (Pet. 41; Tr. 76, 77, Pl. Exs. 11, 12)

The practice at the time was in fact to average the results of the grading appeal with the grading on appeal, thereby permitting the grading appealed from either partially or completely to prove its own correctness (Pet. 41).

Section 3 of the Administrative Procedure Act was designed to prevent the public from being led down such

blind alleys, into booby traps. It has been held to mean just what it says in that regard. *Hotch* v. *U.S.*, 212 F. 2d, 280 (C.A. 9, 1954); *U.S.* v. *Morelock*, 124 F. Supp. 932 (D.C. Md. 1954). The decision below is to the opposite effect, and permits agencies to play the shell game with the public despite the Administrative Procedure Act.

**2. The Force and Effect to be Given Instruction No. 918(PY)-4**

Instruction No. 918 the Court below treated as operative in several ways. The Instruction was ruled to justify the prevention of Anna Chambers, bonded shell egg grader, from performing that function for which she was duly licensed. (App. 15, Pet. 54-56)

The Court also used it to give the semblance of fairness to the illusory frozen egg grading service offered petitioner following cancellation of the contracts, ruling such proposed service to be "no more onerous . . . *read in conjunction with Instruction No. 918* . . . than was permitted by the law and regulations." (App. 20; emphasis supplied) The Court's conclusions in this regard cannot be reconciled with the facts.[7] Petitioner has already shown the Instruction inoperative and ineffective as a matter of law.[8] (Pet. 62; supra pp. 4, 5)

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[7] The Court overlooked the not too trifling circumstance that Instruction No. 918 was cancelled by higher authority before the events occurred which brings its application into question. (*supra*, pp. 4, 5) Also, the USDA proposal following cancellation which would permit Mrs. Chambers to supervise egg processing operations under the contract without grading the frozen eggs was illusory and meaningless. Petitioner needed no authority from USDA to have Mrs. Chambers act as such a supervisor. It needed only authority for Mrs. Chambers to do grading which the proposal forbade. (Pet. 54-56)

[8] But even if the Instruction had not been cancelled, and even if its application were nondiscriminatory, it could not stand and be given legal effect, consistently with the provisions of Section 3 of the Administrative Procedure Act, for lack of official adoption and

Respondent in its statement of the case asserts that "Mrs. Chambers' authority was limited . . . pursuant to the policy expressed in Instruction No. 918 . . . (Resp. Br. p. 11). In argument, however, as previously pointed out, (supra, pp. 5, 6) respondent abandons the Instruction as justification for denying petitioner of her services as an official grader, decision relying instead on a provision of the grading service contracts permitting "the graders to be, in the discretion of the USDA, either a federal or state employee or a licensed employee of the applicant". (p. 18, fn. 5)

Apart from the discriminatory aspects of the status the USDA sought to confer on Mrs. Chambers, the contract clause by its very terms does not apply. A grader is one authorized to grade through the issuance of official certificates. (7 C.F.R. Sec. 55.2(i) (1949 ed.); Pet. pp. 45) The contract clause could not apply to her, since she was denied authority to grade.

### E. The Disputes Clause

The contract of sale between petitioner and USDA contains the standard disputes clause.[9] Petitioner promptly and repeatedly complained about the inspections made by McCurley and Young, and to the contracting officer, orally and in writing. (Pet. 41)

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publication as a regulation. (Pet. 62) In fact, the unpublished Instruction as applied to Mrs. Chambers, was inconsistent with published regulations entitling her as a licensed grader to issue certificates until her license was suspended or revoked by notice and hearing. (7 CFR Sec. 55.35, Pet. 9) No such suspension or revocation occurred. (Pet. 48)

[9] ARTICLE 22. DISPUTES. Any dispute concerning questions of fact which may arise under the Contract and which is not disposed of by mutual agreement, shall be decided by the officer executing the Contract in behalf of the Agency or by a designee of the Agency who shall reduce his decision to writing and mail a copy to the Contractor. . . . Pending decision of such dispute the Contractor shall diligently proceed with the performance of the Contract.

As grounds for questioning the accuracy of the inspections, petitioner challenged the fairness, freedom from bias and honesty of purpose of McCurley. (Pet. 41)

At the time of these complaints, petitioner was only beginning to perform contracts which by their terms would require months of grading before completion. The petitioner's complaints, therefore, by their very nature involved future as well as past gradings by McCurley.

The situation, therefore, was particularly appropriate for exercise of the authority granted by the disputes clause. "Arbitrary rulings and actions of subordinate officers are often adjusted most easily and satisfactorily by their superiors. Furthermore, (the disputes clause) provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions, (petitioner) was not free to disregard them without due cause, accumulate large damages and then sue for recovery in the Court of Claims. Nor can the Government be so easily deprived of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims." *U.S.* v. *Blair*, 321 U.S. 730, 735 (1943)

The disputes clause was for the benefit of petitioner as well as the USDA. The failure of the USDA to make any decision under it was, in and of itself, a breach of contract, *Cape Ann Granite Co.* v. *U.S.*, 100 Ct. Cl. 53, 71 (1943).

The Court below nonetheless denied the disputes clause its proper legal effect, by giving no weight whatsoever to the clause, and instead, penalizing petitioner properly for failing to take administrative appeal as a remedy for the disputes. (supra, pp. 10, 11)

Thus the decision below disregarded the contract and established law that the disputes clause is "the only avenue for relief". *U.S.* v. *Callahan Walker Construction Co.*,

317 U.S. 56, 61 (1942). The record, therefore, presents the question as to whether the Court of Claims has overruled and with retroactive effect the law established by this Court; or whether the Court below has selectively denied petitioner alone the benefit of that established law.

In respondent's statement it asserts that petitioner did not "invoke the former provisions of the disputes clause . . ." although conceding that petitioner did "complain to Washington . . ." (Resp. Br. p. 9). In argument, respondent again asserts that "it can scarcely be contended that the nature of the complaints and the manner in which they were made conformed to . . . the disputes clause." (Resp. Br. p. 17)

Respondent cites no support for these bald propositions for the very good reason that it has none. The disputes clause requires no formal procedure of any kind for its invocation. It applies automatically by its very terms to "any dispute . . . which may arise . . . and which is not disposed of by mutual agreement . . ."[10] Petitioner's complaints, and its urging that the promised USDA investigation pursuant thereto proceed with dispatch, placed USDA on clear notice of existence of the dispute and petitioner's reliance on USDA administrative machinery imbodied in the clause for a solution. (Pet. 40, 41) There is no question but that a dispute over the quality of goods bought by the USDA is within the clause. "No determinations could be more factual . . ." *United States* v. *Hamden Cooperative Creamery Co.*, 297 F.2d 130, 133 (C.A. 2, 1961).

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[10] The question of whether proper *appeal* was taken from the contracting officers' decision has often been litigated. See Joy, The Dispute Clause in Government Contracts, 25 Fordham L. Rev. 11, Esp. 29-38. Respondent's contention that some secret ritual is required to invoke action by the contracting officer is apparently unprecedented.

## II. RESPONDENT'S BRIEF ANALYZED

Petitioner has demonstrated that respondent ignores, and thereby tends to suppress and conceal legal issues of grave import presented by the record (*supra* pp. 2-14).

Respondent's brief possesses the virtue of consistency. It similarly disregards and plays down all other aspects of the case presented to this Court by the record—factual as well as legal.

The eminence of opposing counsel and their extensive experience before this Court compel the conclusion that respondent's brief amounts essentially to a studied and deliberate avoidance of the true case.

There is a certain human wisdom in the folk saying that when one is wrong, "The less said, the better"! It is also true, as a matter of linguistics, that the failure to deal with material matters may be superficially concealed by discussion of irrelevancies.

Specific analysis of respondent's brief, part by part, shows consistent awareness and practice of these rhetorical techniques.

### A. RESPONDENT'S STATEMENT OF THE CASE CONCEDES THE ACCURACY OF PETITIONER'S STATEMENT: OTHERWISE THE CASE IS MIS-STATED BY RESPONDENT

Respondent's statement takes very little issue with petitioner's statement of the case. As a consequence, respondent largely concedes the completeness and accuracy of petitioner's statement.

The rules of this Court require respondent's brief to disclose "any matters or ground why the case should not be reviewed." (Rule 24, par. 1)

Implementing that general requirement of full and fair presentations is the *specific* directive in this Court's rules that respondent's *statement* include, "what may be deemed

necessary in correcting inaccuracy or omission of the other side.[11] "It is fundamental that the Court . . . may accept the statement of the (petitioner) touching on the facts of the case unless these are controverted by the (respondent). The Court cannot be expected to search the record for support of all the statements made by (petitioner). It does so only when a controversy as to such statement is created by a contrary statement in the brief of (respondent)." *Investment Funds Corp.* v. *Bomar*, 306 F. 2d 32 (C.A. 5, 1962).

**1. The Preamble to Respondent's Statement**

The preamble with which respondent begins its statement (Resp. Br. pp. 6, 7) contains a minor inaccuracy, heretofore mentioned. Otherwise it contains nothing of significance. (Supra p. 1) In effect, it sets forth what might be called "vital statistics," such as the existence of petitioner, the fact that contracts were made, and the further fact that petitioner experienced troubles in performing.

These vital statistics might well have been left unsaid. They serve only to make it appear to the casual and superficial reader that respondent is saying something of importance.

**2. Respondent's Statement: "Facts Pertaining to Count I"**

This portion of respondent's statement (pp. 7-9) pursues the same tactics. Of the eight paragraphs (supplemented by two footnotes) only one—the next to the last—(p. 9) does anything more than re-state "vital statistics" already stated by petitioner.

That single paragraph is largely composed of assertions designed to avoid the merits of the issues, and relating to

[11] Rule 40, par. 3, made applicable to briefs and opposition to petitions for certiorari Rule 24, par. 1.

the doctrine of failure to exhaust administrative remedies. Respondent refers in that connection to the regulations regarding administrative appeal of USDA egg grading, and the disputes clause.

To these matters, petitioner has already replied (supra pp. 10, 11, 13, 14). The remaining assertions of this paragraph are untrue.

Petitioner did not, as respondent there asserts, contend that, "the lots offered for inspection failed to meet PY-61 requirements only because . . . fraudulently undergraded . . ." Respondent also contended, and with equal legal force, that McCurley and Young were biased and arbitrary in their gradings and failed to exercise honest judgment in inspecting the eggs sold. (Pet. 12, 58; Resp. Br. 6) Petitioner also asserted and proved that McCurley and Young had rejected lots tendered without inspection and had used an improper candler which, in effect, elevated the contract standards; and that these practices also accounted for the failure of McCurley and Young to certify the lots as meeting the contract requirements as well as excusing petitioner from passing inspection (Pet. 12, 35-38, 42, 43).

Nor is it true, as respondent states in the paragraph in question that the USDA, "investigation failed to substantiate petitioner's claims." Respondent's record reference to support this statement is to testimony by Shearer, that his particular investigation confirmed the accuracy of the gradings of McCurley and Young. But his testimony is belied by his own gradings. While McCurley and Young were rejecting, without exception, 36 lots known by them to belong to petitioner, Shearer despite that atmosphere of rejection accepted 6 of 7 lots he personally inspected. (Pet. 33-35)

### 3. Respondent's Statement: "Facts Pertaining to Count V"

Once more respondent exhibits the dubious virtue of consistency. This portion (pp. 9-13) of respondent's statement also either re-states insignificant "vital statistics" previously stated by petitioner or misstates the case.

Respondent's misstatements are largely concentrated on Instruction No. 918, asserting it made bonded graders, and Mrs. Chambers in particular, subordinate to Government employees, and incapable of certifying official grade. (pp. 10, 11). Petitioner has already shown these assertions to be specious, both as a matter of fact and as a matter of law. (supra pp. 4, 5, 11, 12) More misstatement occurs in respondent's description of events surrounding the cancellation by the USDA of petitioner's grading service contracts. (p. 12)

Respondent's first misstatement in this connection is the assertion that "Petitioner ordered Schoonover out of his plant." Both the record reference of respondent, and the record as a whole, fail to support that statement.

The USDA telegraphic cancellation notice of May 3, 1955 stated (App. 71, 72):

> "As requested in your letter of April 27, 1955 and *because of* actions taken by you and Mr. Altheide on May 2 and 3 in barring Schoonover from your plant all contracts for grading services with the Agricultural Marketing service to be furnished at Avon and Bushnell are hereby cancelled, effective close of business May 3, 1955." (Emphasis supplied.)

The testimony of Schoonover himself, of Mr. Nichols, and Mr. Altheide (Tr. 1023, 666, 344) unanimously oppose any such barring of Schoonover from petitioner's plants. There is no other testimony on the subject in the record, and no finding of the Court below supports this particular assertion. The telegram's error defendant repeats.

This portion of respondent's statement indicates further confusion on respondent's part as to the circumstances of the cancellation of the contracts.

Respondent erroneously asserts (p. 12) that petitioner requested replacement of Schoonover only *after* Schoonover removed all Government property at Dolson's direction after leaving petitioner's plants. For days *beforehand* petitioner had been pleading with Washington to replace Schoonover, and requesting that service be suspended, rather than the contracts be cancelled. (App. 69-72; Petition 53, 54; infra pp. 22-25)

Respondent concludes this portion of its statement by quoting (pp. 12, 13) as authority on the case, this portion of the opinion of the court below which expressly condemns petitioners. This is "Operation Boo strap," discussed infra. It amounts to begging the very question before this Court for its independent review, and closely verges on name-calling. Respondent had full opportunity to demonstrate that petitioner's charges were unsupported, but deliberately, and in violation of this court's rules, defaulted on the merits of those charges. (supra pp. 15-19) It ill becomes respondent to quote and adopt the condemnation of petitioner expressed in the opinion of the court below.

### B. RESPONDENT'S ARGUMENT

#### 1. The False Issue of Conflicting Evidence

Respondent's argument consists for the most part of assertions it seems to bolster by quoting a portion of the opinion of the Court below, that the primary issue in the case is "the weight to be given to conflicting evidence" which the Court below "after a careful review of the whole record" resolved against petitioner. (pp. 13, 14)

This argument has no counterpart in respondent's statement of the case. Petitioner's statement demonstrated that its case was based on findings by the Court and

undisputed, uncontradicted evidence which the Court below largely disregarded (Pet. 27-56); and that the state of the record permits this Court to make "an independent determination as to the legal conclusions and inferences which should be drawn from" the findings and evidence substantially undisputed. *U. S.* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961).

Respondent is precluded by this Court's rules from arguing contrary to the case as stated by both parties. The rules expressly require the statement of the case to contain "appropriate references to the printed record" (Rule 40, par. 1(e)). All references to the record also "must be accompanied by the record page number." (Rule 40, par. 2)

Respondent apparently recognizes that its argument is required to be based upon its statement of the case, since its argument, unlike its statement, contains no references whatsoever to the record.

Nonetheless, respondent in its argument represents to the Court that the case presented to it is only a jumble of conflicting evidence. The opposite respondent has been conceded both as a matter of law, and apparently by deliberate design, by failure to take issue with the petitioner's statement. (supra p. 15)

Respondent's argumentative assertion is made without any record reference to support it, a fact which makes it impossible for the Court to consider this question, "except by its reading and briefing the voluminous record. This (the Court could not) consent to do, and for the reason that (respondent's brief is) not prepared in conformity with the rules prescribed by this Court (it would) decline to consider this (argumentative assertion)". *Houston* v. *Southwestern Bell Telephone Co.*, 259 U.S. 318 (1921)

There is then this reason, added to defendant's concession of the opposite, why this argumentative assertion cannot be accepted.

### 2. The Quotation From the Opinion Furnishes No Support to Respondent

As if furnishing support to this contention, respondent selects, by way of example, a portion of the opinion of the Court below, misdescribing it as a finding. (p. 15) It is settled law that the opinion is not and cannot serve as a substitute for findings. *United States* v. *Esnault Petrie*, 299 U.S. 201 (1936); *American Propeller & Manufacturing Co.* v. *United States*, 300 U.S. 475 (1936); *United States* v. *Causby*, 328 U.S. 256 (1945); *United States* v. *Penn Foundry & Mfg. Co.*, 33 U.S. 198 (1948).

Petitioner has shown (Pet. 23-27) and its statement of the case demonstrates that to search for error and misdescription of the case in the opinion of the court below is like searching for water in the sea. The portion of the opinion quoted by respondent has been specifically shown to be at variance with the facts of record not subject to substantial dispute. (Pet. 13, 27, 28, 30, 38) The opinion cannot properly be used to support, and in light of the record does not in fact support respondent. As a matter of logic, the opinion cannot lift the decision by its own bootstraps. To attempt to use it in that regard is in effect to request this Court to abdicate its function of review.

### 3. The Remainder of Respondent's Argument is Groundless

#### a. Exhaustion of Administrative Remedies

For the most part the remainder of respondent's argument deals with the doctrine of exhaustion of administrative remedies involving the administrative appeals regulation and the disputes clause. (pp. 16, 17) To these contentions, petitioner has already replied. (supra pp. 9-14). Moreover, such a defense even if it were valid, would relate only to dishonest and prejudiced grading by McCurley and Young. It would not extend to rejection of lots tenderd without inspection, because not reworked nor to use of B.B.

candler in violation of the contract terms. (Pet. 35, 36, 42, 43) Petitioner learned the characteristics of that candler only after all grading had been completed under the contracts of sale. (Pet. 42)

**b. The Cancellation of the Contracts**

Respondent asserts in argument (p. 14) that the "grading service contracts . . . (were) cancelled by the government at petitioner's request." Respondent here goes beyond its statement on the same subject. There respondent says (p. 12) that petitioner "wrote to Washington requesting reconsideration of the situation and replacement of Schoonover by inspectors more amenable to petitioner, or waiver of cancellation notice and cancellation of the contracts. *Subsequent telegrams indicated greater insistence on the first alternative than on the latter . . .*" (Emphasis supplied)

The correspondence fairly construed leaves no doubt as to the accuracy of the Commissioner's findings that the cancellation notice "appears to completely ignore petitioner's clarification telegrams . . ."[12] (F107, fn. 36, R. 153; Pet. 53, 54) Like the court below respondent stresses and takes out of context portions of numerous telegrams and letters exchanged between petitioner and USDA, thereby requiring petitioner to review them.

On April 22, 1955, petitioner wired USDA "requesting immediate replacement of Schoonover . . . or a waiver of inspection service . . ." (F72, R. 69) Such a waiver would have left the contracts in effect and have permitted petitioner to complete its sales to the Army, with Army inspec-

[12] Referred to by respondent as "subsequent telegrams."

tion, rather than inspection with Schoonover.[13] The contracts, of course, left petitioner the right to determine its own needs for USDA grading service; and suspension of service had occurred frequently in the past, leaving the contracts in effect. (Pet. 52)

In reply the USDA on April 26 wired petitioner that it could "apply for cancellation without consideration to the 30-day clause . . ." relating to notice of cancellation. (F72, R. 70)

On April 27 petitioner wrote the USDA a lengthy letter which was essentially a plea to stay in business rather than have the contracts cancelled, and which stated in part: (F73, App. 70)

> ". . . I realize as you also do that complete cancellation of your contract for USDA service will undoubtedly automatically cause us to cease operations. If for any reason you feel after finding out the true facts that cancellations of your contracts are in order we will accept your decision and close the business.
>
> • • • • •
>
> "13. We are left no alternative from your telegram but to accept the present grader Mr. Schoonover or request cancellation; It is impossible for us to accept

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[13] The Commissioner found (F108, R. 154):

> "Since PMA declined to make any change in its assignment of Schoonover to plaintiff, it was plaintiff's desire to have the continuing service for shell egg grading suspended so that he could avail himself of the Veterinary Corps inspectors. "In 1949, the plaintiff had requested and received suspension of its service contract because of economic reasons."

The court did not adopt this particular finding, although adopting others on both sides of it (F75,76, App. 72), even though defendant took no exception to the foregoing findings by the Commissioner. (Def. Br. & Excep. 198, 171, 172) As the correspondence record and the findings demonstrate, the USDA cancelled the contracts without ever granting petitioner's request for suspension of service, made as a matter of right.

> the present grader under the circumstances either physically, financially, or mentally and altho we would like to receive the service on the proper basis and *do not wish same*[14] must request immediate cancellation unless given reconsideration by yourself or a superior."

It is the letter of April 27 quoted above which the court and respondent rely upon for the conclusion that petitioner desired and requested cancellation. (App. 18-20, Resp. Br. 12) The lack of petitioner's desire is expressly stated, as is the plea for personal investigation by Mr. Hamann, Chief of the Grading Branch, PMA, to whom the letter was addressed. "It is not uncommon for a citizen to repose upon the good faith and discretion of some public officer representing the Government and responsible for the protection of its interests in a transaction, and the citizen frequently consents to stipulate, submitting client's matters to the judgment of such officer. In such cases, however, such officer is required to exercise the highest degree of care, good faith and honest judgment, and must not act arbitrarily or capriciously. The party who has stipulated to submit a matter to the judgment of another is entitled to have it exercised in good faith by the officer nominated and cannot be bound unless such officer acts reasonably and with due regard to the rights of both contracting parties." *Globe Grain Co.* v. *United States*, 70 Ct. Cl. 595, at 625, 626.

That Hamann knew petitioner was not requesting and did not desire cancellation is evident from his telegram to petitioner of April 29 in which he stated: (F73, App. 71)

> "Please clarify your statements requesting waiver of service and discontinue our present business do you desire to cancel your contracts for grading service and request that we waive the 30 day cancellation clause please advise immediately."

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[14] Emphasis supplied. The reference by "same" is clearly to cancellation.

On April 29 petitioner wired Hamann stating in part: (F74, App. 71)

> ". . . our dealers met and are desirous continuing business if possible please read our letter 27th and advise accordingly suggest you give serious consideration to reconsidering entire situation before making a decision."

Another wire from petitioner to Hamann, also on April 29, stated: (F74, App. 71)

> ". . . note your wire states contracts plural when at issue is contract here and Schoonover be advised we wish to continue contracts Bushnell plant and same should be left alone unless you are deliberately attempting to void them."

Without further communication with petitioner the telegraphic cancellation notice was sent by Hamann May 3, stating in part: (F74, App. 71, 72)

> "As requested in your letter of April 27, 1955 and because of actions taken by you and Mr. Altheide on May 2 and 3 in barring Schoonover from your plant all contracts for grading services with the Agricultural Marketing service to be furnished at Avon and Bushnell are hereby cancelled, effective close of business May 3, 1955 the acceptance of your notice of cancellation of contracts does not affect your privilege of requesting non-contract grading under the regulations."

The following day petitioner protested the cancellation by wire to Hamann stating in part: (F75, App. 72)

> "In reply to your telegram May 3rd cancelling contracts made no request for any cancellation. In our letter April 27th 1955 we offered to accept your decision on questions after personal investigation by you here which you did not make that offer now withdrawn did not bar Schoonover from plant."

The record of correspondence thus demonstrates that not even the USDA thought petitioner wanted or had

unconditionally requested cancellation. What petitioner wanted and requested, was a suspension of service while the situation was investigated. This, the USDA denied petitioner, instead repeatedly inviting cancellation of the contracts, though knowing this would in effect put petitioner out of business. Finally the USDA sought to twist Schoonover's departure into a barring of him from the plant, as the main reason used and given for the cancellation.

The cancellation extended to contracts involving Bushnell where Mrs. Chambers was a licensed and functioning frozen egg inspector. Those contracts were not even involved, as petitioner's second telegram of April 29 specifically stated. Their cancellation, therefore, completely precluded the conclusion that the cancellation was pursuant to request by petitioner.

The undisputed evidence further establishes that during this exchange of telegrams the USDA officials involved failed to accept and failed to return repeated telephone calls from petitioner's attorney. (Pet. 54) That petitioner did not bar Schoonover from its plant has already been demonstrated. (Supra p. 18)

### 3. Significant Omissions From Respondent's Argument

#### a. Counts II, III and IV

Respondent's argument makes no mention of Counts II, III and IV. This omission is made even more striking by respondent's failure to uphold the court's finding that petitioner admitted in oral argument it had failed to prove it sustained any damages under those counts. (F3, App. 21) Instead, and consistently with petitioner's presentation (Pet. 17) respondent in its statement of the case describes that admission by petitioner as being "at least that it had been unable to prove 'full damages' ". (p. 7)

Thus both expressly, and by failure to mention Counts II, III and IV, respondent apparently concedes the court

below improperly gave no consideration to those counts as claims in their own right. It is also plain, that the wrongs committed under those counts compel the conclusion that McCurley and Dolson, the culprits, were engaged in a campaign against petitioner to wrong it in other respects through their power over the grading service at the very time McCurley graded the eggs sold. Such a course of action completely negates any possibility that McCurley acted fairly in the grading. (Pet. 18, 21-24).

**b. Counts I and V**

Petitioner's argument, like its statement of the case (supra pp. 15-19) almost completely ignores the facts showing that recovery should have been allowed under those counts, and that the court disregarded its own findings, and uncontroverted evidence, in denying such recovery.

Respondent's argument also fails to address itself to important legal issues presented by the record (supra pp. 2-18) and by the petition (pp. 3, 58-67). The only legal argument made relates to exhaustion of administrative remedies. (Resp. Br. 47)

## III. CONCLUSION

Respondent's brief on analysis furnishes clear demonstration of strong and compelling reasons why the writ of certiorari should be granted.

This it does largely by what it does not say. By omission to take issue with petitioner's statement, and failure to discuss the grave legal issues presented respondent, in violation of the rules of this Court, defaults on the existence of those reasons.

Respondent's strategy seems to be to minimize, to depreciate and to belittle the issues involved by treating them as if non-existent. At the same time, respondent mis-

states the issues as involving determinations of fact arrived at on the basis of conflicting evidence. Such misstatement of the issues, if accepted as accurate, would naturally incline this Court to deny certiorari to avoid a time consuming and burdensome task, not its province to perform.

This Court should not be beguiled by such tactics. It must recognize that the errors of fact and law are so widespread, so uniformly adverse to petitioner, and so unjustifiable, as to amount, in their totality, to the denial to petitioner of a full and fair hearing and the equal justice under law to which petitioner is entitled under the Fifth Amendment.

It is particularly significant that such hearing was denied by the Court of Claims, a court of first instance, so that petitioner and three generations of the Nichols family have as of the present time, been ruined, and expressly ridiculed and defamed; without a fair hearing, by the very court established to consider and fairly rule upon its complaints: in fact the only court to which petitioner could go.

The discretion to grant or deny certiorari was certainly never intended, and certainly has never been exercised by this Court, so as to result in a person being denied justice by the federal judicial system without a fair hearing, let alone to permit unfair judicial ridicule and condemnation to stand uncorrected.

The questions of law which the court below decided erroneously are in conflict with law established by the decisions of this Court, courts of appeal, and state courts as well. They include federal questions involving the power of the Department of Agriculture to discriminate between persons engaged in marketing agricultural products, the Administrative Procedure Act, and the disputes clause, which is standard in government contracts. The decision below in its totality has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The inability

and unwillingness of respondent to discharge its burden of demonstrating the opposite confirms those conclusions. The writ should be granted.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 418

NICHOLS & COMPANY, *Petitioner*

vs.

THE UNITED STATES, *Respondent.*

## PETITION FOR RECONSIDERATION OF DENIAL OF PETITION FOR CERTIORARI

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The denial of the petition for certiorari leaves standing a decision presumably unique in the annals of the Federal judicial system.

The true character of the decision below, as a travesty of justice, is largely obscured by the court's opinion. That opinion embodies subtle departures from rules of law universally accepted and established. The description of the facts bears little relation to the whole truth (even to the court's own findings). The total effect produced by the opinion is completely misleading.[1]

[1] Because of the gravity of the matters involved, the petition for certiorari was specifically detailed and therefore lengthy. The accuracy of petitioner's statement therein was almost entirely conceded by respondent's failure to take issue in its counter statement. (Respondent's Brief in Opposition pp. 6-13; Petitioner's Reply pp. 15-19) Accordingly, petitioner's references to support the statements here made will be to portions of its petition for certiorari of unchallenged accuracy.

## THE IMPORTANCE OF USDA FRAUD, CORRUPTION AND OPPRESSION

Epitomizing that misleading effect is the opinion's severe condemnation of petitioner for making "unsupported charges [1] against Government officials and employees . . . who were doing their duty" (App. 5, Pet. 20).

In thus summarizing the decision, the opinion compresses in a few words the decision's tolerance and disregard of widespread fraud, corruption and oppression within the USDA. Widespread and regular fraud has been proven, as well as oppression. (Pet. 14, 15) Fraud by government officials does not occur for its own sake, but as a companion to their corruption.

Evil in the USDA does not, as an abstract matter, necessarily mean that petitioner should have had judgment. But the undisputed facts show, as petitioner here demonstrates, that *because* of such evil, petitioner's refusal to be a party to it, and its prospective exposure in this proceeding, the wrongs petitioner charged as injuries were committed. In the course of disregarding and interpreting into significance that evil, the decision concurrently disregarded those wrongs to petitioner of which the evil was an integral part.

This Court has recently condemned even the opportunity for and temptation to official wrongdoing, notwithstanding subjective good faith (United States v. Mississippi Valley Generating Company 364 U. S. 520 20 (1961)). It there described official wrongdoing (p. 567) as:

> ". . . an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."

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[1] Found fully proved by the Commissioner.

The record here clearly presents that evil, and, even worse, its disregard by the court below with resultant condemnation of petitioner, its victim.

There is no question that petitioner in its troubles with the USDA was facing a corrupt combination of its competitors and government officials. That corruption was self-financing. Fortunes were (and in view of the decision below perhaps still are) made through the fraudulent and discriminatory grading practices of which petitioner was the victim. (Pet. 14)

Fighting such money and its corrupting influence is difficult, even under ideal circumstances. Yet the Commissioner found the facts for petitioner. (Pet. 14, 15)

Petitioner was entitled to expect a full and fair hearing of its charges, before the court established by Congress for that purpose. The issues should have been determined with the "application of the fact-finding tribunal's experience with the main springs of human conduct to the totality of the facts . . .", further described by this court as the "informed experience with human affairs that fact-finding tribunals should bring to this task."[1] (Commissioner v. Duberstein 363 U.S. 278 (1960) at 289 and 292).

The corrupt combination of wealth and government is not even modern. In Thomas More's UTOPIA, written at the beginning of the 16th Century, he stated:

> "So when I consider and turn over in my mind the state of all flourishing commonwealths today, so help me God, I can see nothing but a conspiracy of

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[1] Chief Judge Marvin Jones has a long and illustrious record of familiarity with agricultural matters of government, in both legislative and executive capacity. (Who's Who in America Vol. 32 p. 1614) He heard and participated actively in oral argument of this cause, demonstrating familiarity with the issues and the record. Unfortunately, he cast no vote in the court's decision. (App. 20)

> the rich, who are aiming at their own advantage under the name and title of the commonwealth."

In any cause a suitor is entitled to a full and fair hearing if the court is to be worthy of its name. The sordid features of this case make such a hearing of compelling importance. Yet petitioner did not receive it, as this petition will demonstrate.

## THE BURDEN UPON THIS COURT

Petitioner is not unmindful of the heavy burden its duties impose on this court.[1]

The burden which this case will impose will be much lighter than has appeared so far, particularly with proper presentation by both sides. The disregard by the court below of its own findings simplifies the task confronting this Court, permitting it to make "an independent determination as to the legal conclusions and inferences which should be drawn from them." (364 U.S. at 275)

Petitioner will raise very few issues on which there is any question whatsoever in the evidence, and then only when the factual conclusions permit no real dispute.[2]

It is necessary for this Court to go behind the opinion. But that is required in any event,[3] for the "findings may

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[1] Nor is respondent. In fact, respondent's brief in opposition to the petition for certiorari seems to have attempted to make capital of that burden by confusing rather than simplifying the issues. Its statement conceded the accuracy of petitioner's statement, yet in argument it claimed the whole case was largely a matter of inferences to be drawn from conflicting evidence—a contention contrary to its concessions. (Resp. Br. pp. 13, 14; Pet. Reply pp. 19, 20)

[2] As for example, matters evidenced by USDA official records concerning the accuracy of it there is no genuine dispute.

[3] The opinion itself indicates that necessity. The condemnation of petitioner for making unsupported charges, if not the purpose, at least has the effect of discrediting petitioner before this Court. Again, the opinion, creates the atmosphere of heat and unfounded charges which it purports to decry (App. 3, 4); and in the innu-

not be aided by statements in the . . . opinion of the Court". (U.S. v. Esnault Petrie, 299 U.S. 301 (1936) at 206); the court's "opinion may be resorted to help interpret, although not to supplement, the court's findings of fact."[1] (U.S. v. Penn. Foundry Mfg. Co. 337 U.S. 198 (1948) at 208).

## OFFICIAL FRAUD, CORRUPTION AND OPPRESSION WITHIN THE USDA GRADING SERVICE

The officials honorably discharged of any wrongdoing, while petitioner was being condemned, include Thomas McCurley and Lawrence Dolson, persons at least *officially* responsible for persistent and widespread fraud and corruption in USDA grading of eggs. (Pet. 12-14)

There is no question as to the fact of that corruption. Fraudulent USDA egg grading is established as having regularly occurred in four sample years—1949 through 1952—the very period of petitioner's inability to obtain essential grading services and fair grading, despite contracts entitling petitioner to such service. (Pet. 21-24) Indeed, the four counts which comprised the petition as originally filed in the court below were confined to events within that period, notwithstanding a contrary statement in the opinion.[2] (Pet. 14, 15, 12)

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endos of thorough search of the record, resulting only in "suspicion" (App. 6; 20) even a slight familiarity with the true facts shows the opinion 'doth protest too much'".

[1] Respondents brief and opposition to the petition contrary to the foregoing rules of law, relied largely upon the opinion of the Court below, as self justifying, thereby impliedly inviting this Court to do the same. (Respondent's brief, pp. 15, 16; petitioner's Reply, p. 21).

[2] The opinion of the court below misstates the facts in saying (App. 5) that "the period covered is prior to plaintiff's contracts." Those contracts were *all* entered into within the four-year period during which fraud was proved to be regular and commonplace.

Besides erroneously describing the period of regular fraud as not embracing the time of petitioner's contracts with USDA, the court below failed to consider that fraud in its most pertinent connection.

The climax of petitioner's troubles with USDA occurred April 15, 1955 with replacement by Dolson of the inspector then assigned to petitioner, with Schoonover, a Chicago inspector.

In a couple of weeks Schoonover ruined petitioner's highly prosperous business. Dolson caused that replacement *shortly after the USDA learned that petitioner's study of USDA grading accuracy would be introduced in evidence in this cause, showing regular and widespread fraudulent grading at Chicago by inspectors working there under Dolson.* (Pet. 14, 15)

Dolson's knowledge of imminent disclosure of widespread fraud obviously supplied a spur to carry out his threat, made in the fall of 1952, to put petitioner out of business for filing a claim against the Government, the basis of Count V. But the opinion ignores this strong motive for his sudden action in April of 1955, and treats the widespread fraud as if solely relevant to evidence personal fraud by McCurley and Young, his assistant charged in Count I. (App. 5; Pet. 18, 19) It thereby repeats use of a false issue, to dismiss widespread fraud as irrelevant to Count V by implying that nothing occurred between Dolson's threat in the fall of 1952, and his installation of Schoonover as a means of petitioner's destruction in April of 1955, which could account for such delayed action![1]

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[1] The Court states (App. 12, 13): "If Dolson meant to carry out his threat to put plaintiff out of business through unfair grading of its products, as plaintiff alleges, it would seem he would not have waited until April 15, 1955, to set about doing so." That Dolson was not waiting is shown infra, pp. 10, 11. Learning of the imminent disclosure of fraud and corruption he accelerated execution of his threat.

Thus, the opinion, while severely condemning petitioner touches only lightly upon fraud and corruption regular and widespread throughout the USDA grading service, and so treats it as to deprive it of the significance it inherently possessed, as proof under Count V, rather than Count I.

## THOMAS McCURLEY AS AN OFFICIAL ONLY DOING HIS DUTY

For a matter of years in the period of proven regular USDA corruption, Thomas McCurley, USDA Illinois State Grading Supervisor, and Lawrence Dolson, USDA Area Supervisor, and McCurley's superior, had, without justification, denied petitioner essential grading service, causing petitioner's specialized plant and equipment to remain idle.[1] (Pet. 21-24)

These wrongs to petitioner—breaches of contract as well as discriminatory practices—were committed for no *valid* or *legitimate* reason. The Commissioner found and reported the undisputed fact that there was no "no evidence that plaintiff was involved in any violation of regulations pertaining to the inspection and grading service of the PMA or in the production of its eggs and egg products" (F 79, R 134).[2] No fault on petitioner's part can justify those wrongs.

Nor does any official explanation exist. In depriving petitioner of that essential grading McCurley and Dolson were false to their official trust as well as injuring petitioner. For it was in the *public* interest that the products were to be marketed with their grade officially determined.

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[1] These grading services consisted of the grading of frozen eggs (Count II); shell eggs in consumer cartons (Count III); and dressed poultry (Count IV).

[2] The court below on its own motion vacated this undisputed finding to which the respondent had taken no exception (App. 57; Fed. Excep. pp. 191, 192).

What, then, was the reason?

Within that period of proven corruption—in the fall of 1952—McCurley's actual motives became apparent. The time was approaching for him to inspect some millions of eggs sold by petitioner to the USDA for fall delivery.

Shortly prior to that inspection, he asked petitioner to finance him personally in the poultry and egg business, by selling merchandise "on credit". *Only upon petitioner's refusal* did McCurley tell Mr. Nichols that storage eggs *would not* pass inspection.[1] Since the terms of the sale *required* the eggs to have been in storage, this was clear warning to Mr. Nichols that McCurley would reject the lots to be offered. (Pet. 28, 29)

For the USDA State Supervisor to solicit personal financial aid from a large wholesaler under his jurisdiction, and within his power, carries obvious implications of extortion.

To do so shortly before that same official is to grade millions of eggs sold by the wholesaler to the USDA heightens those implications.

To warn the wholesaler, promptly upon refusal of the solicited favor, that the eggs sold could not pass inspection, makes that implication a presumed fact.

To engage in such solicitation and warning at a time when the official had a continuing record of having arbitrarily denied the wholesaler various grading services, generally available to the trade, make the attempted extortion even more clear. The solicited financial aid brought

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[1] The court below in its findings (F 25, App. 39) statese in reverse order of actual occurrence McCurley's solicitation and subsequent warning of certain rejection, and further states ambiguously that they occurred ". . . about this same time . . ." By failing to state the true time order of these events (Pet. 29) the finding tends to conceal the extortionate character of McCurley's solicitation.

out into the open the reason why those services were wrongfully denied, in violation of contract rights, and in breach of McCurley's official trust.

Yet even further proof of McCurley's extortionate purpose exists.

He soon gave the lie to his own statement that storage eggs could not meet the contract standards by inspecting and accepting the first 11 of the 47 lots tendered by petitioner. It was not until those 11 consecutive and unanimous acceptances had occurred, that McCurley learned that the contracts under which they had been tendered belonged to petitioner, rather than the broker in whose name made. (Pet. 30)

On learning of petitioner's ownership of its broker's contracts, McCurley promptly rejected the remaining 36 (slightly superior) lots, obviously because owned by petitioner, rather than because of their inherent quality. (Pet. 30) The real character of McCurley's warning was thereby conclusively revealed to be part of a continuing extortionate scheme.

Nor is this the end. In his testimony in this case McCurley falsely denied making any advance statement about any difficulty in meeting the contract requirements; and concocted an elaborate, false fabrication to explain his acceptance of the 11 lots first inspected. Were he acting honestly, there would have been no need for that perjury. (Pet. 29, 30)

McCurley, (if not the court below,) was plainly aware of the incriminating character of his misconduct, and sought to conceal it by perjury.

Other perjury by McCurley, and other dishonest grading by him occurred as well. (Pet. 31, 32, 35-38)

This worthy is one of the officials whom the Court found was only doing his duty, and severely condemned petitioner for charging with misconduct.

## LAWRENCE DOLSON AS AN OFFICIAL ONLY DOING HIS DUTY

Dolson shares equally with McCurley responsibility for discriminatory denial to petitioner, in violation of Dolson's duties to encourage and promote official grading in the public interest, of various types of grading service over a period of years (Supra p. 7) Those high-handed wrongs were matched by his threat in the fall of 1952 to put petitioner out of business if it dared to seek justice in the manner authorized by law. (Pet. 13, 44)

Dolson carried out that threat. First, by degrees, he deprived petitioner of and for of most and for long periods all of the shell egg grading service essential to petitioner's business. (Pet. 47-50)

Upon learning of the prospect of exposure of regular fraud and corruption by USDA inspectors under and close to him at Chicago, he administered the coup de grace' to petitioner by assigning a Chicago inspector to petitioner's plants as exclusive shell egg grader there. (Pet 50-51) That inspector, Schoonover, swiftly destroyed the highly prosperous and growing Tri-State Marketing Plan, demonstrating Dolson's threat to be no idle one. (Pet. 51-54)

The opinion and the findings of the court below have been shown to have artificially converted Dolson's oppressive threat into public spirited insistence that petitioner comply with laws and regulations. (Pet. 44-47)

To sum up:

There is no question but that Dolson beginning in 1950 with McCurley, denied petitioner the right to market its products with various types of official grading, contrary to his official duty to promote such grading. There is also no question but that Dolson, sensitive to the prospect of suit by petitioner, threatened to ruin petitioner if such claim were filed, and effectively did so. This he

accomplished first by gradually depriving petitioner of the slight grading service petitioner was furnished before Dolson's threat, and on learning of imminent disclosure of regular fraud by Dolson's inspectors at Chicago, by compelling petitioner to use the services of a Chicago inspector who swiftly ruined petitioner's business.

Yet the court condemns petitioner for even making charges against Dolson.

## FURTHER PATENT DISREGARD OF AND DISTORTION OF UNDISPUTED FACTS

Brief mention is made below of action by the court further demonstrating the absence of a fair hearing. Although the counts are interrelated, such action will be separately stated, according to the counts involved.

### Counts II, III and IV

These counts received no consideration whatsoever by the court, resulting in no hearing at all. The assigned reason for their disregard was, according to the opinion, a statement by petitioner in oral argument admitting that "it had not made out a case on these counts". (App. 1) In this regard the opinion went farther than the court's corresponding finding, which stated only that on oral argument "plaintiff conceded that it had failed to prove it sustained any damages under Counts II, III and IV. . ." (Pet. 17).

Neither concession was made. (Pet. 17, 18).

The court's apparent mistake concerning oral argument, it declined to rectify on motion for reconsideration. (Pet. 21, 63, 64).

That refusal occurred, despite the fact that even such a concession with respect to *recovery* under those counts did not extend to withdrawing the highly persuasive evi-

dentiary character of the facts proved under them, as supporting Counts I and V. (Supra p. 7; Pet. 12, 17-19)

Yet the court made no findings under those counts, even after motion for reconsideration pointed out this indefensible error. (Pet. 21)

As a consequence, there is no question but that in its consideration of Counts I and V, the court below disregarded forceful evidence in petitioner's favor.

**Count I**

Ironic indeed is the professed *suspicion* of the court below of fraudulent grading by McCurley of the eggs sold, engendered by variances between gradings by McCurley at Peoria, and gradings elsewhere. (App. 6) In disregarding those variances, the court speculates that "perhaps the quality of the eggs offered was not the same. . ."

The record is clear that the eggs rejected by McCurley and Young were slightly superior to the lots accepted elsewhere, and also superior to lots which they themselves accepted before knowing them to belong to petitioner. (Pet. 27, 28). The court simply ignored these critical and undisputed facts.

It is also undisputed that in grading the eggs sold, the USDA used a candler, which greatly magnified and enlarged the scope of observable defects, in effect elevating the contract standards. (Pet. 42, 43)

That fact and that alone entitled petitioner to recovery under Count I. (Pet. 58)

The court deprived it of that effect, by treating it (App. 7) as relevant only "to show partiality" under Count V, rather than simple and clear breach of contract

under Count I. The court then ruled this fact irrelevant on the false issue of its own choosing. (Pet. 42, 43)

## COUNT V

Once again, the court creates a *false* issue, resulting in disregard of facts proving the *true* issue.

With respect to grading service furnished petitioner after Dolson's threat, it refers to the graders furnished petitioner, and then proceeds to state that "plaintiff does not assert that any of the foregoing inspectors failed to render fair and impartial service." (App. 12)

The court is correct in its statement, but incorrect in the implications of that statement.

Indeed, petitioner was satisfied with the graders thus enumerated, and wanted to keep them, and have additional graders assigned as well. It was *Dolson's* pretexts that served as the occasion for terminating their services, leaving petitioner for many months with no such grading service at all. (Pet. 47, 48)

This was clear discrimination and oppression, as well as a violation of petitioner's rights to adequate grading service. To say that *petitioner* did not complain about their services would corroborate if necessary, the fact that petitioner wanted *more* such service.

The Weinberg incident was used as a pretext to deprive petitioner of the services of Brown, one of those graders. It also constituted further oppression by Dolson and the USDA in various ways, including suppression of a deposition taken by Weinberg in a suit with petitioner, after cross-examination of Schrimsher the deposition witness. (Pet 50) The court below, in referring to the suppressed deposition, treated that obstruction of justice for petitioner's benefit saying (App. 16):

> "Schrimsher was Weinberg's witness, no doubt, and his testimony must have been unfavorable to Nichols. If it was never put in evidence, so much the better for Nichols."

One can hardly believe that the court below is not familiar with the fact that cross-examination can turn the testimony of a witness against the party who offered him. The absurdity of the court's ruling, therefore, necessarily serves as a measure of the court's impartiality.

The court further concluded that "plaintiff had decided to go out of business, unless it could continue with the grading service it demanded." (Pet. 53, App. 2d) The undisputed facts are that petitioner represented three generations of the Nichols family in this industry (Pet. 10); that at the time petitioner was netting approximately $40,000 per year, despite oppression by the USDA (Pet. 14, 51); and that petitioner did not make a decision to go out of business, but continued in business for several years thereafter. (Pet. 15) In fact, during oral argument, respondent asserted inaccurately, that as of that time, petitioner was still in business. (Pet. 53, 54) Thus this conclusion of the court is contrary to common sense, and the facts of record, and wholly fails to leave any reason for petitioner's ruin except the facts found by the Commissioner, largely adopted by the court in its findings—deliberate ruin by USDA.

## CONCLUSION

Of undeniable literary and rhetorical character, viewed in the light of the facts, even as found by the court below, the opinion is a parody with strong aspects of comic opera, a game of make-believe.

Counts II, III and IV, constitute a history of unjustifiable wrongs to petitioner, for many months preceeding and continuing through, the gradings of eggs sold to USDA, by McCurley who graded those eggs. Those counts

the court dismissed from the case in their entirety. They show a persistent wrongful and extortionate scheme by McCurley, expressly revealed by his solicitation of financial aid before immediately grading the eggs sold.

Counts I and V then remained.

The court held proven breach of contract under Count I as failing to prove Count V. It also held proof under Count V failed to prove Count I.

These are only some of the judicial novelties which resulted in dismissal of the complaint.

The result of that dismissal, and the accompanying statements in the opinion, was to vindicate official fraud, corruption, extortion and oppression, and to condemn its victim.

Petitioner respectfully submits that the necessity of preserving the appearances of conformity to the accepted course of judicial proceedings requires this Court to grant the writ in the exercise of its power of supervision, as well as in recognition of petitioner's rights to both procedural and substantive due process.

Respectfully submitted,

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**Certificate of Service**

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

FRANK J. DELANY

*Counsel for Petitioners.*